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REPORTS
OF
CIVIL AND CRIMINAL CASES
DECIDED BY THE
COURT OF APPEALS
OF KENTUCKY

ROBERT G. HIGDON, Reporter.

VOLUME 183, KENTUCKY REPORTS.

CONTAINING CASES DECIDED FROM
JANUARY 24, 1919, TO APRIL 18, 1919.



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JUDICIAL OFFICERS OF THE STATE

COURT OF APPEALS OF KENTUCKY

HON. JOHN D. CARROLL, Chief Justice

ASSOCIATE JUSTICES.

HON. ROLLIN HURT

HON. GUS THOMAS

HON. ERNEST S. CLARKE

HON. FLEM D. SAMPSON

HON. HUSTIN QUIN

HON. WARNER E. SETTLE

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Monday in January, 1916.

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2nd District—W. M. REED	Paducah
3rd District—CHARLES H. BUSH	Hopkinsville
4th District—CARL HENDERSON	Marion
5th District—JOHN L. DORSEY	Henderson
6th District—R. W. SLACK	Owensboro
7th District—JOHN S. RHEA	Russellville
8th District—McKENZIE MOSS	Bowling Green
9th District—J. R. LAYMAN	Elizabethtown
10th District—D. A. McCANDLESS	Munfordville
11th District—I. H. THURMAN	Springfield
12th District—CHARLES C. MARSHALL	Shelbyville
13th District—CHARLES A. HARDIN	Harrodsburg
14th District—ROBERT L. STOUT	Frankfort
15th District—SIDNEY GAINES	Burlington
16th District—FRANK M. TRACY (C. C. L. & E. Div.)	Covington
16th District—M. L. HARBESON (C. L. & E. Div.)	Covington
17th District—OTTO WOLFF	Newport
18th District—L. P. FRYER	Butler
19th District—C. D. NEWELL	Maysville
20th District—WM. C. HALBERT	Vanceburg
21st District—WM. H. YOUNG	Morehead
22nd District—CHARLES KERR	Lexington
23rd District—JAMES P. ADAMS	Beattyville
24th District—J. F. BAILEY	Paintsville
25th District—W. R. SHACKELFORD	Richmond
26th District—W. T. DAVIS	Pineville
27th District—WM. LEWIS	London
28th District—B. J. BETHURUM	Somerset
29th District—JAMES C. CARTER	Tompkinsville
30th District—HARRY W. ROBINSON (Criminal Branch)	Louisville
30th District—ARTHUR WALLACE (Chy. Br., 1st Div.)	Louisville
30th District—SAMUEL B. KIRBY (Chy. Br., 2d Div.)	Louisville
30th District—WM. H. FIELD (Common Pleas, 1st Div.)	Louisville
30th District—THOS. R. GORDON (Com. Pleas, 2d Div.)	Louisville
30th District—WALTER P. LINCOLN (Com. Pleas, 3d Div.)	Louisville
30th District—CHAS. T. RAY (Com. Pleas, 4th Div.)	Louisville
31st District—A. T. PATRICK	Prestonsburg
32nd District—ALLEN N. CISCO	West Liberty
33rd District—JOHN C. EVERSOLE	Hazard
34th District—R. S. ROSE	Williamsburg
35th District—JOHN F. BUTLER	Pikeville
36th District—D. W. GARDNER	Salyersville

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Elected November 2, 1915, for a term of six years, beginning the first Monday in January, 1916.

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2nd District—JACK E. FISHER	Benton
3rd District—DENNY P. SMITH	Cadiz
4th District—CHARLES FERGUSON	Smithland
5th District—N. POWELL TAYLOR.....	Henderson
6th District—C. E. SMITH	Hartford
7th District—JAMES R. MALLORY	Elkton
8th District—JOHN H. GILLIAM	Scottsville
9th District—HENRY DEHAVEN MOORMAN.....	Hardinsburg
10th District—J. LESLIE WILLIAMS	Glasgow
11th District—B. T. HARDING	Campbellsville
12th District—CHARLES H. SANFORD	New Castle
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18th District—JAMES C. DEDMAN	Cynthiana
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20th District—JOHN F. COLDIRON	Catlettsburg
21st District—W. C. HAMILTON.....	Mt. Sterling
22nd District—JOHN R. ALLEN	Lexington
23rd District—KELLY KASH	Irvine
24th District—W. E. LITTRELL	Paintsville
25th District—BEN. A. CRUTCHER	Winchester
26th District—J. G. FORRESTER	Harlan
27th District—GODFREY L. RADER	Annville
28th District—WALTER N. FLIPPIN	Somerseset
29th District—ALLEN A. HUDDLESTON	Burksville
30th District—JOSEPH M. HUFFAKER	Louisville
31st District—JOHN D. SMITH	Prestonsburg
32nd District—JOHN W. WAUGH	Grayson
33rd District—R. B. ROBERTS	Hyden
34th District—J. B. SNYDER	Williamsburg
35th District—R. MONROE FIELDS	Whitesburg
36th District—FLOYD ARNETT	West Liberty

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DECISIONS

OF THE

Court of Appeals of Kentucky

WINTER TERM, 1919.

Neutzel, Clerk v. Fiscal Court of Jefferson County.

(Decided January 24, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas, First Division).

1. **Officers—Compensation or Salary of—Constitutional Law.**—Under sections 161 and 235 of the Constitution neither the compensation nor the salary of any public officer can be changed during the term for which he was elected.
2. **Officers—Jefferson County Court—Increase of Fees of County Clerk—Constitutional Law.**—An act of the legislature increasing the fees of the clerk of the Jefferson county court did not apply to the officer during the term the act was passed.
3. **Officers—Clerk of Jefferson County Court—Compensation of.**—The compensation of the clerk of the Jefferson county court cannot under any circumstances exceed seventy-five per cent of the amount collected and turned into the state treasury.
4. **Officers—Fees of—Increase in For Benefit of State.**—The legislature may increase the fees that may be charged for services performed by an officer and provide that the increase may be collected by the officer and turned into the state treasury.

J. S. LUSCHER and C. H. SEARCY for appellant.

J. MAT CHILTON and NAT C. CURETON for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Reversing.**

This litigation grows out of a controversy between Neutzel, clerk of the Jefferson county court, and the

fiscal court that has charge of the fiscal affairs of the county, as to whether the clerk should be allowed the increased fee for rendering certain service that was authorized by an act of the legislature passed after his term of office commenced.

At the time Neutzel was elected clerk of the Jefferson county court there was a law in effect allowing clerks five cents for each tax bill made out for the sheriff or collector of taxes. After his election, and in 1918, the legislature so amended the former law as to give clerks seven cents for each tax bill made out.

Assuming that he was entitled to the increased fees allowed by the act of 1918 the clerk presented his claim therefor to the fiscal court and upon their refusal to pay the increased fees he brought this suit in the Jefferson circuit court to compel them by mandamus to do so, and the circuit court having decided against him he prosecutes this appeal.

It is provided in section 161 of the Constitution that: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office." And also in section 235 of the Constitution that: "The salaries of public officers shall not be changed during the terms for which they were elected."

Under these constitutional provisions it has been written in numerous cases that neither the compensation, whatever may be the method of its payment or the service for which it is charged, nor the salary, if the office be a salaried one, of a public officer can be changed in any manner during his term of office either by increasing or reducing his compensation or his salary. If the compensation of the public officer is derived from fees for specified services, these fees cannot be diminished or increased during his term; and if he is paid a fixed sum as a salary for each day or week or month or year his salary cannot be decreased or increased during his term. In other words, the purpose of these provisions was to secure to the officer during the term of his office exactly the same compensation or salary, no more and no less, than under the law he was entitled to receive at the time he was elected to the office. *Thomas v. Hager*, 120 Ky. 428; *Frizzel v. Holmes*, 131 Ky. 373; *James v. Barry*, 138 Ky. 656; *Greene v. Cohen*, 181 Ky. 108. Therefore if these provisions of the Constitution are applicable to

the case we have there is no room to doubt that the court below properly refused to allow the clerk to recover the increased fee authorized by the act that became a law after his election. Indeed this is conceded by his counsel.

It is contended, however, that the right of the clerk to the increased fee provided by the act of 1918 is not to be controlled or determined by the sections of the Constitution referred to, the argument in this behalf being that these sections are not applicable to the clerk of the Jefferson county court, as Jefferson county has a population of more than seventy-five thousand, and under the Constitution and Statutes the compensation of the clerk of that county is regulated by section 106 of the Constitution and sections 1761, 1762, 1763, 1764 and 1769 of the Kentucky Statutes.

Section 106 of the Constitution reads in part as follows: "In counties or cities having a population of seventy-five thousand or more, the clerks of the respective courts thereof (except the clerk of the city court), the marshals, the sheriffs and the jailers, shall be paid out of the state treasury, by salary to be fixed by law, the salaries of said officers and of their deputies and necessary office expenses not to exceed seventy-five per centum of the fees collected by said officers, respectively, and paid into the treasury."

Section 1761 of the Kentucky Statutes provides that the clerk of each county having a population of seventy-five thousand or over shall, on the first day of each month, send to the State Auditor of Public Accounts a statement showing the amount of money received or collected by him during the preceding month, and with such statement shall send the amount so collected.

In section 1762 it is provided that the clerk shall receive an annual salary of five thousand dollars and the number of his deputies and the compensation to be received by each and the amount allowed for the expenses of his office shall be regulated and fixed by the circuit court at a sum not exceeding two thousand dollars per year for his chief deputy and fifteen hundred dollars per year for his other deputies.

In section 1764 it is provided that: "The salary of each officer, his deputies and expenses of office, shall be paid monthly by the treasurer of the state upon the warrant of the auditor, made payable to the officer. If seventy-five per cent of the amount paid into the state

treasury in any month is not sufficient to pay the salaries and expenses for that month, the deficit may be made up out of the amount paid in any succeeding month; but in no event shall the amount paid by the auditor to any officer for salaries and expenses exceed seventy-five per cent of the amount paid into the treasury each month by such officer, during his official term."

It is further provided in section 1769 that if the amount paid to the clerk during his term out of the fees paid by him to the auditor shall not be sufficient to pay the salaries and expenses of his office the State Auditor shall, out of the money collected and paid in by his successor that was due on account of fees earned during his term that were turned over to his successor to collect and by him paid to the auditor, pay to him "an amount sufficient to supply the deficit due for salaries and expenses, not exceeding seventy-five per cent of the amount of fees accrued during his official term, and which shall have been collected and paid into the treasury."

It will be observed that under these constitutional and statutory provisions the salary of the clerk of the Jefferson county court and his deputies and the office expenses shall not exceed seventy-five per centum of the fees earned during his term and paid into the state treasury by him or by his successor. All the fees collected by his office must be paid into the state treasury and the treasurer in turn must pay to him out of the amount received on account of such fees the amount allowed to him, his deputies and for office expenses not exceeding seventy-five per centum of the amount turned in to the state treasury. In no event and under no circumstances can there be paid out of the state treasury to the clerk for himself, for his deputies or his office expenses a sum in excess of seventy-five per cent of the amount he has paid into the treasury, or that his successor has paid in out of the fees turned over to him for collection.

If seventy-five per cent of this amount will satisfy in full the salaries and expenses, well and good; but if seventy-five per cent will not satisfy them then the clerk and his deputies must lose the difference between the amount they were allowed and the amount they can be paid out of the seventy-five per cent.

It therefore seems quite clear that the clerk is personally and directly interested in any action of the legislature that would, during his term, either increase or re-

duce the fees of his office. A reduction, if allowable, might result in reducing the salaries of the office. An increase, if allowable, might make perfectly secure the salaries allowed. Accordingly we think that sections 161 and 235 of the Constitution apply to the clerk of the Jefferson county court and that the legislature cannot either reduce or increase for the benefit of his office the fees of the office during the term. The clerk of the Jefferson county court is entitled, as are all other public officers, to have the fees and salaries remain as they were when he was elected.

But the fact that the legislature cannot, under the constitutional provisions referred to, interfere with the fees to which the clerk or public officer is entitled when he is elected to office does not prevent it from increasing the fees during his term and providing that the increase shall be paid into the state treasury for the use and benefit of the state.

We think the legislature may at any time, and during the term of any officer, increase the fees that may be charged for services performed by him and provide that the increase may be collected by the officer and turned into the state treasury. Such a law might be so framed as to be in force for the use and benefit of the state not only during the term of the officer in whose term the act was passed but during the terms of his successors in office. Whether such an act would affect the fees of officers mentioned in section 106 of the Constitution who were elected after it took effect we do not decide.

And as the fees of this office are to be paid into the state treasury, the clerk, under our view of the law, is entitled to collect in this action for the state the excess allowed by the act of 1918, but in this excess the present clerk or his office has no interest whatever. The clerk merely collects it for the state and pays it into the state treasury for the use and benefit of the state.

We do not mean to say, however, that his successor in office will not be entitled to seventy-five per cent of the fees fixed by the act of 1918. We only hold that the act of 1918 does not apply to or in any manner affect the present clerk or his office.

It follows from what we have said that the judgment must be reversed with directions to overrule the demurrer to the petition and for proceedings not inconsistent with this opinion.

Commonwealth, By etc. v. Lee's Trustee, et al.

(Decided January 24, 1919.)

**Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).**

1. **Taxation—Inheritance Tax—Persons Liable.**—An administrator is not liable for inheritance taxes unless the property came into its hands or it was entitled to administer thereon.
2. **Taxation—Inheritance Tax—Persons Liable.**—Where a non-resident woman, by written agreement, delivered property to a trust company to hold and manage for her benefit, with a provision, that if the agreement was not terminated, or if she did not dispose of the property by will, it was to pass absolutely to those persons who, under the present statutes of descent in Kentucky, would be her heirs at law, a trust was created in favor of her heirs which the trustee had the right to discharge by direct payment to them, and in the absence of a showing that the general estate of the decedent, which came into the hands of the decedent's administrator in this state, was insufficient to pay the debts of the decedent due to citizens of this Commonwealth, the resident administrator had no right to administer on the trust property, and was not liable for the inheritance taxes.
3. **Taxation—Inheritance Tax—When Payable—When Collectible by Coercive Process.**—Though an inheritance tax may be paid at any time after the death of the decedent, yet subject to the exception that the executor, administrator, or trustee must pay the tax within thirty days after its retention or receipt by him, the tax cannot be collected by coercive process until after the expiration of eighteen months from the death of the decedent, and even this time may be extended, if by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of the decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent.
4. **Abatement and Revival—Taxation—Inheritance Taxes—Another Action Pending—Dismissal.**—A non-resident woman, owning securities situated in this state, died intestate. A resident administrator was appointed and the greater portion of her estate passed into its hands. A portion of her estate consisted of securities, placed in the hands of a trustee, with directions to pay the property to the intestate's heirs, under the statute of descent in Kentucky. Soon after the death of the intestate, the Commonwealth brought suit against her local administrator to collect inheritance taxes. The collection of taxes was suspended by necessary litigation. On the termination of the litigation, the trustee filed a proceeding asking for the appointment of an appraiser, in order that it might pay the inheritance taxes due on the trust estate. The next day, the Commonwealth filed a supplemental petition, making the trustee a party to the proceeding instituted by it

against the administrator. Before judgment was rendered in the latter proceeding, the trustee pleaded the pendency of the action which it brought for the same purpose: Held, that the suit against the administrator did not affect the trustee, and that no action was pending against the trustee until the institution of the supplemental proceeding against it; that the proceeding by the trustee, and the proceeding against it by the Commonwealth, involved the same cause of action, i. e., the liability of the trustee for inheritance taxes, and were between the same parties, to-wit: the Commonwealth and the trustee, and as the proceeding by the trustee was prior to that brought by the Commonwealth, the latter action was properly dismissed because of the pendency of the former.

MAT J. HOLT for appellant.

BARRETT, ALLEN & ATKISSON for Fidelity & Columbia Trust Company.

PERCY BOOTH for U. S. Trust Company.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

In April, 1912, Gertrude Belknap, a resident of Louisville, Ky., married Ronald C. Lee, a resident of New York. For a few months after their marriage they continued their residence in New York, but later on became residents of the state of New Jersey, where they were domiciled upon the death of Mrs. Lee, in January, 1913. No children were born of the marriage and Mrs. Lee left surviving her only her husband, two brothers and a sister. Mrs. Lee left a large personal estate, consisting of stocks, bonds and other securities which were held in Kentucky. Upon her death, her husband qualified as administrator in New Jersey, while the United States Trust Company qualified as her administrator in Kentucky. What is termed her general estate passed into the hands of the United States Trust Company. Another portion of her estate consisted of securities which she had placed in the hands of the Fidelity & Columbia Trust Company, with power to manage, control, invest and reinvest the property and pay to her the net income therefrom. The material provisions of this agreement are as follows:

"Third. This agreement may be terminated by mutual consent of the parties hereto at any time or upon sixty days' written notice by the party of the first part to said party of the second part of her desire that the

agreement shall be terminated and the securities and estate delivered back to said party of the first part, or as she may direct.

"Fourth. In the event that this agreement is not terminated by the parties, or either of them as herein provided, upon the death of the party of the first part, the estate so held in her behalf by said second party shall pass as may be directed by the last will and testament of the party of the first part, or by writing in the nature of a last will and testament, and in the absence of such will, the property shall pass absolutely to those persons who, under the present statutes of descent in Kentucky, would be the heirs at law of the party of the first part."

The foregoing agreement was never terminated and Mrs. Lee died intestate. A controversy arose between her brothers and sister on the one hand and her husband on the other, as to their respective shares in Mrs. Lee's estate, and within five months from the time of her death a suit was brought to settle the controversy. The chancellor adjudged that her husband was entitled to one-half of the estate, and her brothers and sisters to the other half. On appeal it was held that the husband was entitled to the whole of Mrs. Lee's general estate, but that the chancellor's ruling that he was entitled to only one-half of the trust property was proper, and on March 9, 1915, the judgment was reversed, with directions to enter judgment in conformity with the opinion. *Lee v. Belknap*, 163 Ky. 418, 173 S. W. 1129.

In the meantime the Commonwealth, by its revenue agent, had, on August 1, 1914, filed a proceeding in the Jefferson county court against the United States Trust Company as administrator of Gertrude B. Lee, to have her estate assessed and held liable for inheritance taxes, on the ground that her estate passed to her collateral kindred. To this proceeding the United States Trust Company filed an answer, pleading in substance that the estate of Gertrude B. Lee was in litigation, and that until the litigation was ended, it was impossible to tell whether any inheritance tax was due or not, and asked the court to postpone the appointment of an appraiser until it was determined whether or not the husband took the whole estate.

On March 12, 1915, the Fidelity & Columbia Trust Company filed, in the Jefferson county court, its petition, reciting the history of the litigation over Mrs. Lee's prop-

erty, the effect of the decision rendered in that case, and asked the appointment of an appraiser to ascertain and report the amount of taxes due, in order that it might discharge its duty. Thereupon, the court appointed an appraiser.

On the following day, the Commonwealth, by its revenue agent, filed an amended and supplemental statement in the proceeding theretofore instituted against the United States Trust Company, alleging that the Fidelity & Columbia Trust Company held in its possession, as agent and trustee of the estate of Gertrude B. Lee, personal property belonging to the estate, of the value of \$30,000.00, which passed to the collateral kindred of the intestate and was subject to inheritance taxes. It further alleged that the Fidelity & Columbia Trust Company was a proper and necessary party to the proceeding and asked that a summons issue against it. To this proceeding the Fidelity & Columbia Trust Company, as trustee, filed an answer pleading the pendency of the action which it had brought for the same purpose, and the appointment by the county court of an appraiser, and asked that the action brought by the Commonwealth, by its revenue agent, be dismissed. On final hearing in the county court, the report of the appraiser was approved and confirmed and the Fidelity & Columbia Trust Company, as trustee for the decedent, was held liable for the amount of the inheritance tax going to the two brothers and sister of the decedent, together with the interest and penalty thereon at 10% per annum, from January 8, 1913, until paid, together with 20% penalty due the revenue agent as relator. On appeal to the circuit court the proceeding instituted by the Commonwealth on March 13, 1915, was dismissed, and the Commonwealth, by its revenue agent as relator, appeals.

(1) It is conceded that the general estate that passed into the hands of the United States Trust Company, the whole of which was payable to the husband of Mrs. Lee, was not subject to an inheritance tax under the statute then in force. Indeed, the sole purpose of this proceeding is to collect the inheritance tax due on what is called the trust estate. Clearly, the United States Trust Company could not be held liable for the inheritance tax on the trust estate unless it actually came into its hands, or it had the right to administer thereon. The agreement under which the property was held provided that if the agree-

ment was not terminated, or the property was not disposed of by will, the property was to pass absolutely to those persons who, under the present statutes of descent in Kentucky, would be the heirs at law of the party of the first part. Not only so, but the ruling of this court in *Lee v. Belknap*, *supra*, that the husband was not entitled to the whole of this portion of the estate under the New Jersey law, was based on the conclusion that, by the agreement, the property was impressed with a trust in favor of Mrs. Lee's heirs under the Kentucky statute of descent, and that the title passed to them under and by virtue of the agreement. That being true, the Fidelity & Columbia Trust Company, as trustee, had the right, as was adjudged by the lower court, to discharge the trust by paying the trust property directly to said heirs, and since it was not made to appear that the general estate, which came into its hands, was insufficient to pay the debts of the decedent due to citizens of this Commonwealth, it clearly follows that the United States Trust Company was not entitled to administer on the trust estate. Hence, there is no basis for the claim that the United States Trust Company is liable for the inheritance taxes due on any portion of the trust estate.

(2) While the inheritance tax may be paid at any time after the death of the decedent, yet, subject to the exception that the executor, administrator or trustee shall pay the tax within thirty days after it has been received or retained by it, it is not collectible by coercive process until after the expiration of eighteen months from the death of the decedent, and even this time may be extended if, by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of the decedent, or part thereof, cannot be settled at the end of the eighteen months from the death of decedent, as provided in section 4281e, Kentucky Statutes. *Richter v. Commonwealth*, 180 Ky. 4, 201 S. W. 456. Here, the estate was involved in necessary litigation, and until that litigation terminated it was impossible to settle the estate, or to determine whether or not any inheritance taxes were due. The opinion of this court, disposing of the questions involved, was not handed down until March 9, 1915. On March 12, 1915, the Fidelity & Columbia Trust Company filed its petition asking for the appointment of an appraiser to ascertain and report the

amount of taxes due, in order that it might discharge its duty. Up to that time, no proceeding had been instituted against the Fidelity & Columbia Trust Company. Indeed, the tax was not collectible by coercive process until after the opinion of this court was rendered. The original suit against the United States Trust Company was in no sense a suit against the Fidelity & Columbia Trust Company. It was an independent action to which the Fidelity & Columbia Trust Company was not a party, and could not in any way affect the latter's liability. Hence, the amended and supplemental statement, filed in the original action against the United States Trust Company, was in effect the institution of a new proceeding against the Fidelity & Columbia Trust Company. Before judgment was rendered in the supplemental proceeding against the trustee, the trustee pleaded the pendency of the former action which it had instituted. The two proceedings involved the same cause of action, namely, the liability of the trustee for inheritance taxes, and were in effect between the same parties, to-wit, the trustee and the Commonwealth. Under these circumstances the trial court did not err in dismissing the proceeding brought by the Commonwealth because of the pendency of the prior proceeding brought by the trustee for the same purpose. Judgment affirmed.

**Commonwealth, for the use and benefit of the Board of
Education of the City of Louisville v. Mehler &
Eckstenkemper Lumber Company.**

(Decided January 24, 1919.)

**Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).**

1. **Escheat—Enforcement.**—A corporation may hold real estate for a longer period than five years, although not devoted to legitimate corporate use, if it is held in anticipation of its future use for legitimate corporate purposes, with an ever present intention to devote it to such use.
2. **Escheat—Enforcement.**—Upon proof by the Commonwealth in an action to escheat real estate, that it has been held for longer than five years, without having been devoted to use for legitimate corporate purposes, the burden of proving that it is being held for such future use with an ever present intention of so using, shifts to the defendant.

3. **Escheat—Enforcement.**—The intention with which real estate is being held by a corporation beyond five years, as a necessary ingredient in the offense that will escheat the property, is provable not alone by the minutes of the directors' meeting but by any evidence that has probative value of the defendant's real intention in holding it.
4. **Escheat—Enforcement—Evidence.**—The uncontradicted evidence of the defendant's president of its intention and purpose with reference to the lot attempted to be escheated in this action held to be sufficient to avoid an escheat.

MARSHALL B. HARDY and WM. WALLACE DOWNING for appellants.

FURLONG, WOODBURY & FURLONG for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Under authority of subsection 27 of section 2978a, Kentucky Statutes, the Board of Education of Louisville instituted this action against appellee, a corporation, to recover title and possession of a city lot fronting twenty-five feet on St. Xavier street, in the city of Louisville, upon the ground that same had escheated to the Commonwealth.

Section 192 of the Constitution and section 567 of the Statutes, provide in almost identical terms that no corporation "shall hold or own any real estate, except such as may be necessary and proper for carrying on its legitimate business, for a longer period than five years, under penalty of escheat." Construing these several provisions, this court has held that a corporation may hold real estate for a longer period than five years, although not devoted to legitimate corporate use, when the holding is in anticipation of its future use for such purposes, accompanied by an ever present intention to devote it to such use. *German Insurance Company v. Commonwealth*, 141 Ky. 606; *L. & N. Railway Company v. Commonwealth*, 151 Ky. 325; *Louisville School Board v. King*, 127 Ky. 824; *Commonwealth v. Louisville Property Company*, 128 Ky. 790.

This lot was purchased by the defendant in February, 1909, at a decretal sale in an action in which its mechanic's lien thereon was foreclosed, and had not been devoted by the defendant during the five years it had owned it before this action was instituted, to any proper or necessary use in carrying on its legitimate busi-

ness, but the defendant as a defense to this action, alleged that it had held the lot during this period in anticipation of its future use as a branch lumber yard, accompanied by an ever present purpose to devote it to such use, and the only question involved is whether or not the company was holding the lot with such an intention and purpose. Under such circumstances, the burden of proving this intention was upon the defendant. *German Insurance Company v. Commonwealth, supra.* To sustain this burden, the defendant introduced the testimony of its president, Mr. William Mehler, and the minute book of the directors' meetings, which was all of the evidence introduced. Upon a trial of this single issue, the court dismissed the petition, from which judgment the plaintiff has appealed.

The minutes of the directors' meetings introduced do not show any intention or policy upon the part of the company with reference to the lot in question, and it is insisted by counsel for plaintiff that a corporation can form an intention and adopt a policy only at a formal meeting of the board of directors, entered of record in its minute book, and that in the absence of an intention or purpose with reference to the lot in question so formed and proven, there is no evidence to sustain the judgment of the lower court, and that the evidence of the defendant's president as to the company's intention with reference to the lot, was wholly incompetent and of no probative value whatever.

To sustain this contention counsel for appellant cite numerous authorities, in which it is stated that directors have no power to bind their corporations, except in formal meetings; that they have no power to delegate their discretionary powers to an official, and that the powers of an official are limited to those properly delegated to him by the directors. This is unquestionably the general rule, but upon the other hand authorities are abundant that a corporation within its power may be bound by the manner in which it permits its officers in the regular course of business to conduct its affairs, even though there is no formal delegated authority for such officer to so act, and this, too, even though the act of an officer was in violation of express and formal direction, if by subsequent action the board had ratified such action or had merely acquiesced therein. See *Bell & Coggeshall v. Kentucky Glass Works*, 106 Ky. 7; *Elk Valley Coal Com-*

pany v. Thompson, 106 Ky. 614; L. & N. Ry. Co. v. Dickey, 24 Ky. L. R. 1710; Michaelroy v. Minneapolis Percheron Horse Co., 96 Wis. 317; Langsdale v. Bonton, 12 Ind. 1267; Brackston v. Stanton, 96 N. Y. S. 1096; Munsey v. Bell, 24 Utah 1048, 10 Cyc. 903. 17 Cyc. 506. But in our judgment, none of these authorities dealing with contractual responsibilities of corporations are of assistance in deciding the question now before us, because the only question involved in this, an action by the Commonwealth to deprive defendant of its property as a penalty for a violation of law, is the defendant's intention or motive in doing an act, the legality of which depends solely upon the motive with which it was done. We are inclined to think it would be quite unusual to find in the record of the directors' meetings of any corporation, a statement of the company's purpose in acquiring or holding property of any kind, but however that may be, we are quite sure that there is neither reason nor law requiring that its purposes or intentions shall be made a matter of record, nor that a record if made would or could ever be conclusive if competent upon such an inquiry. Such a record would no doubt, under some circumstances, be competent evidence, but the most formal declaration of good or lawful intent by a corporation would surely not be entitled to more weight than the declaration of an individual of his motive in doing an act, and could not be accepted as conclusive in an action where the intention or motive of the act was the vital factor in determining whether the act was legal or otherwise, especially in an action which, though civil in form, is of such a highly penal character as to subject the defendant, if guilty, to the loss of its property. Clearly in our judgment, when the Commonwealth attempts to deprive a corporation of its property as a penalty for an alleged illegal use, its president has the right to testify not only as to the present temporary uses to which the lot in question is being devoted, but also as to the company's needs and purposes as understood and being developed by him as executive agent, with reference to the lot in question, and to have his testimony weighed and considered in connection with any other proven acts or statements by the company or its responsible agents, or other circumstances that might have probative value in determining what in fact, was the company's real purpose in holding the property. It must be apparent that even if the directors of a corporation should

at a regular meeting duly declare and record its purpose to purchase and permanently hold real estate for a legitimate purpose in connection with its business, that such declaration, if not self serving and incompetent, would at least not be conclusive against the Commonwealth, if as a matter of fact, it could be shown by the uses to which the company had permanently devoted the property, or its lack of adaptability for use in connection with the company's business, or otherwise, that it was not its intention or purpose to use the property in any business it had authority to do it. And it seems equally apparent that even though there had been no record or formal declaration of intention, the Commonwealth could not take the real estate of a corporation by escheat, that it was actually using in the proper and necessary management of its business. In each of these instances, the intention of the company as a necessary ingredient of an offense charged, would certainly be provable by any act or statement or circumstance which had a tendency to prove the defendant's real intention or motive in doing the proscribed act, and such is, we think, the rule of evidence applicable here.

Mr. Mehler, the defendant's president, testified in substance that it is now and has been since the purchase of this lot the settled purpose of this company to establish branch yards in different sections of the city, to enable it to make deliveries to its patrons throughout the city, more promptly and less expensively; that the lot involved in this action, together with another lot subsequently purchased in the same block and facing the same street with but seventy-five feet intervening between the two, was being held by the company in pursuance of said policy, with the ever present intention of using these lots in connection with other property to be acquired adjacent thereto, as a branch lumber yard in that section of the city, for which purpose this property is peculiarly adapted; that the company had not sooner completed its design with reference to the lot in question, although it is at present engaged in improving property for use as a branch yard in another section of the city, because of the temporary depression in its business during the period immediately preceding the war, and the abnormal cost of material since the beginning of the war; that its business in this section of the city approximates \$8,000.00 a year; that the company is a "close" corporation, hav-

ing only about nine stockholders, all or most of whom are related; that the meetings of its directors have been infrequent, and that the minutes of these meetings do not furnish a record of any considerable part of the transactions of the company; that he, as the president and sole executive officer, has for about twenty years, managed, developed and protected the company's business, in accordance with the wishes of the directors as expressed in informal discussions, rather than in formal orders of the board. This evidence in our judgment under the circumstances, was competent evidence to prove the intention of the company in holding the lot in question for a longer period than five years, and was substantial proof, and not being contradicted, sufficient to sustain the defendant's plea, that it was holding the lot in question in anticipation of its future use for a legitimate corporate purpose with an ever present purpose to devote it to such use.

Wherefore, the judgment is affirmed.

Charles I. Hudson & Company v. Wood.

(Decided January 24, 1919.)

Appeal from Jefferson Circuit Court
(Chancery Branch, Second Division).

1. **Discovery—Transfer of Claims—Defenses—Evidence.**—Where defendant in a judgment transfers to plaintiff therein claims aggregating more than the amount of the judgment upon condition that plaintiff would institute suits to recover the claims and suspend proceedings on the judgment as against defendant until the recovery of a final substantial sum, in a suit upon the claims plaintiff can not proceed to collect the judgment against defendant when he failed to prosecute suits upon the claims and permitted them to become barred by limitation without taking action. Such facts constitute a defense in a suit for discovery brought upon a return of no property found after execution upon the judgment against defendant.
2. **Discovery—Transfer of Claims.**—A transfer of claims upon the terms mentioned in division No. 1 above is different from an accord and satisfaction, since the transferee obligates himself to do certain things and to suspend action as against the transferor until those things are done; while in accord and satisfaction the transfer operates ipso facto to extinguish the claim against the transferor. However, if the transaction in this case amounted to an accord and satisfaction it would not be affected by the rule that

a fixed indebtedness may not be satisfied by the payment of a smaller sum, since the claims transferred are nominally greater than the claim against the transferor, and in addition, some of them belonged to and were transferred by a third party.

3. **Discovery—Transfer of Claims.**—A transfer of claims upon the terms mentioned in division No. 1 imposes greater duties upon the transferee than those of a mere holder of collateral security, the duties of the latter being that the security holder must exercise due diligence to collect the collaterals and is liable for damages for a failure to exercise it, while in the other case he is not only subjected to the same duties, but can not proceed on the original claim until he has prosecuted the collaterals to judgment.

E. B. BEARD and EDWARDS, OGDEN & PEAK for appellants.

H. H. NETTLEROTH for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

This is a suit in the nature of a bill of discovery brought in the court below upon a return of no property found, seeking to collect a judgment which appellants (who are partners and who were plaintiffs below) recovered against George T. Wood & Company (a partnership) in the United States circuit court for the Western District of Kentucky on May 17, 1902, for the sum of \$81,029.70, and \$554.75 costs. The suit was filed against the appellee, George T. Wood, as the sole defendant, leaving out his other partners, who were defendants in the judgment sought to be collected.

The suit was defended mainly upon the ground that plaintiffs had failed to comply with the terms of a contract entered into between the parties on March 26, 1903, whereby defendants in the judgment and George T. Wood & Company (a corporation) transferred to plaintiffs in the judgment certain claims held by George T. Wood & Company, both as a partnership and corporation, against St. John Boyle, Louis Appel and Samuel Avritt, aggregating more than the amount of the judgment, and that by reason thereof plaintiffs were barred as well as estopped from prosecuting the present case. Appropriate pleadings put this defense in issue and upon submission the court sustained the defense and dismissed the petition, and to reverse that judgment this appeal is prosecuted.

To understand the issue both of law and of fact it is essential that a brief statement of the facts be made.

During the year 1900, George T. Wood & Company (a partnership) were engaged in the brokerage business in the city of Louisville. A part of that business consisted in dealing in stock upon the stock exchange of the city of New York. That firm had as its correspondent in New York the plaintiffs, Charles I. Hudson & Company, who were members of the stock exchange and who owned seats therein. Messrs. Boyle, Appel and Avritt were customers of George T. Wood & Company, and through them dealt in stock on the New York exchange, which dealings were transacted by the Louisville brokers through their New York correspondents. Some time in December, 1900, Boyle, through his agents and brokers, George T. Wood & Company, sold on the New York stock exchange 100 shares of Northern Pacific Railroad Company common stock. In the latter part of January, 1901, another transaction of the same character was made, but in the meantime George T. Wood & Company had become incorporated, and the latter transaction was with the corporation. An unsettled and panicky condition afterwards arose upon the stock market, especially concerning Northern Pacific common, which advanced in price until in May, 1901, it sold for as high as \$1,000.00 per share. On the day prior to this high water mark Boyle was notified by George T. Wood & Company that he must put up additional margins to meet the advancing price of the stock which he had sold, the price having gone far above that at which he had agreed to sell it in the two transactions referred to. Although he promised to do that, he failed, and on the following day (May 9) he could not be found. To save themselves the plaintiffs, representing George T. Wood & Company, who were the agents of Boyle, went upon the market and purchased the two hundred shares, paying therefor \$500.00 per share for one hundred shares and \$600.00 per share for the other one hundred, and charged the difference between the price at which the stock was agreed to be sold by Boyle and that for which it was purchased by Boyle's agents, George T. Wood & Company, which difference was the amount of the judgment recovered in the Federal court. Wood & Company contended that since they were acting only as the agent of Boyle, he, as their principal, was indebted to them in the amount of the losses which they sustained in executing his transactions, and it was this claim that was transferred in the

contract of March 26, 1905, which claim included additional sums for losses in other transactions, making it larger than the amount of the judgment recovered in the Federal court by something like \$18,000.00. The claims of Appel and Avritt transferred by that contract arose in the same way. It is shown in this case that there was actual handling of the stock involved in the transactions, relieving them of any wagering aspects, and the defense of wagering contracts is not relied on in the pleading, even if it had been available under the terms of the contract herein relied upon.

Prior to entering into that contract plaintiffs had instituted an equity action similar to this one in the Federal court at Louisville, where the original judgment was recovered, and that suit was pending at the date of the execution of the contract relied on. The contract is too long to copy in full herein, and we will take only such excerpts therefrom as are necessary to present the defense here made. It recites the facts, stipulates that second parties (plaintiffs herein) shall have the right to sue and take such proceedings against those who owe the assigned claims as may be necessary, either in the name of Wood & Company or of plaintiffs, in any court in Kentucky or elsewhere, and binds Wood & Company to lend all proper aid and assistance and to make full and true disclosures of all accounts and the transactions had with the parties whose accounts are transferred and to freely and truthfully testify in any court where any proceeding may be instituted, and then inserts the agreements and undertakings of plaintiffs in these words:

“The said parties of the second part, in consideration of the covenants and agreements and undertakings of the said first parties, hereinabove set out, do hereby undertake and agree, upon the institution of any action against St. John Boyle hereunder to dismiss, without prejudice, their pending action in the circuit court of the United States for the Western District of Kentucky, in equity, at complainants' cost, and to suspend any further proceedings against the said George T. Wood, George L. Bacon and Carey H. Bacon, George T. Wood & Co. as a firm and also as a corporation, except such proceedings as may be necessary, in their judgment, to enforce the claims against the said St. John Boyle, and the said Avritt, and the said Appel, as hereinbefore mentioned.

"And said parties of the second part do further undertake and agree that upon recovery of any final substantial judgment against the said St. John Boyle under the foregoing arrangement, all claims, demands or obligations which may exist in favor of said second parties from said first parties, or any of them, by reason of the transactions heretofore set out or by reason of the judgment rendered, as aforesaid, shall be released, acquitted and discharged."

Shortly after the execution of this contract Boyle went to New York and defendant's firm notified plaintiffs of that fact and a suit was instituted by plaintiffs against him in the courts of that state some time in May, 1903. That suit pended upon the docket with various apparently unnecessary delays until January, 1906, when Boyle died, a resident of the city of Louisville, leaving a will in which his wife (who also resided in Louisville) was named as sole devisee and executrix of his will. A year or more after his death some kind of effort was made to revive the New York suit against Mrs. Boyle as the personal representative of her husband, but this was abortive because of inability to get personal service upon her, and some time in 1908 that suit was abated.

At no time since the death of Boyle did plaintiff make any effort or institute any proceeding in Kentucky or elsewhere to collect the assigned claim, except the futile effort to revive the New York suit referred to. Nor did plaintiffs at any time endeavor in any manner to collect either of the assigned claims against Appel and Avritt, although it appears that the last two have been and are solvent, and that Boyle, at the time of his death, was worth, over and above his debts, something like \$65,000.00, and defendant now insists that this negligence on the part of plaintiffs, which is alleged to be gross, and which resulted in the assigned claims becoming long since barred by limitations, constitutes a bar and estoppel preventing plaintiffs from now asserting any claim under the Federal court judgment.

It will be observed that the contract relied on obligates plaintiffs to do three things: (1) To dismiss the then pending equity action in the Federal court immediately upon the institution of a suit against Boyle to recover the claim assigned to them. (2) To suspend any further proceedings against Wood & Company looking to the collection of the judgment except such as may be

necessary to enforce the claims against Boyle, Avritt and Appel, and (3) to release the judgment entirely upon the recovery of any final substantial judgment against Boyle. The first of these was immediately carried out upon the institution of the New York suit against Boyle. The second was not complied with, because of which the defense herein made is relied on, and the third is necessarily unexecuted since it is dependent upon the faithful observance of the second one.

It is insisted by plaintiffs (a) that for the defense herein to be available it was incumbent upon defendant to show that if due diligence had been used by Hudson & Company they would have succeeded in recovering a substantial judgment against Boyle, and that such judgment could and would have been collected; (b) that if under the facts it be conceded that plaintiffs could have recovered in a proceeding to collect the assigned claims, the judgment sued upon should not be credited with more than what the proof shows could have been collected, and that they are entitled to recover the balance of their judgment and interest. Other questions involved in these two contentions are made, and which so far as necessary will be considered as we proceed with this opinion.

Briefly considering contention (a): The fault with it as we view the rights of the parties is that it treats the contract as an assignment of the claims only as *collateral security* for the judgment, and it is based upon the duty of the holder of collateral security as deducible from the law governing the rights of the parties in such cases, ignoring one of the express stipulations in the contract involved. That stipulation, as will be seen, is in substance that all proceedings to collect the judgment (except such as may be necessary to enforce the assigned claims against the parties owing them) shall be suspended after the institution of suits upon the claims and remain suspended until final substantial judgment shall be recovered, which, if collected, the judgment shall be released. This contractual obligation imposes a greater duty upon the assignee of the claims than that imposed by the law upon the holder of ordinary collateral security. That duty is for such holder to exercise ordinary diligence to collect the collateral and if he should fail to exercise it he would be liable to his debtor for the amount of damages sustained by such failure, which the debtor could plead as a *pro tanto* counterclaim or set-off in a suit against

him, and this is the extent to which the cases of *Bonta v. Curry*, 3 Bush, 679; *Roberts v. Farmers Bank*, 118 Ky. 80, and other authorities relied upon by plaintiffs, apply. For that legal rule to be serviceable it is always necessary for the debtor to show that the proper diligence on the part of the holder of the collateral would have resulted in the collection of the sum claimed as damages.

The contractual obligation now being considered imposed the duty upon plaintiffs to prosecute the collection of the assigned claims with due diligence, and to *suspend all* proceedings upon the judgment pending the suits upon the claims, and it is not open to plaintiffs to relieve themselves of that obligation by unwarranted refusal to take legal steps looking to their collection, thus permitting the matter to remain in abeyance until the claims are forever barred. In other words, they can not defeat their obligation to suspend proceedings upon the Federal court judgment by declining to prosecute suits upon the assigned claims to final judgment. In this view of the case it matters not whether they would have recovered or could have collected a final substantial judgment or not; but if we were mistaken in the position assumed, there is nothing in the record to show that a final substantial judgment would not have been recovered and collected. On the contrary, the reverse is true, since *Boyle* is shown to have had no positive defense to the claim assigned against him, and he left an estate, as we have seen, worth \$65,000.00 above his debts.

It is further insisted that defendant is now barred by limitation to make the defense herein relied upon since it is based upon negligence of plaintiff, and no action can be maintained therefor after five years. This might be true as to the excess of the assigned claims above the amount of the judgment sued on if a judgment against plaintiffs was sought by defendant for such excess, but he is only insisting upon the right to *defeat* plaintiff's suit because of such negligence. Such right exists as long as the original claim may be collected, and is not affected by limitation. *Altman & Taylor v. Meade*, 121 Ky. 241, which holds in substance that so long as the courts will hear plaintiff's case time will not bar the defense which might be urged thereto and which grew out of transactions connected with plaintiff's claim. While this suit is based upon a judgment fixing the amount due, the defenses relied upon grow out of transactions connected

with that judgment and may be relied upon in a proceeding to collect the judgment, although such matters would be barred by limitations in an independent suit based thereon.

It is furthermore insisted that the contract relied on is at best in its nature and essence but an accord and satisfaction, and that since a fixed debt may not be extinguished by the payment of a less sum, the defense should not prevail because under the proof it would have been impossible to collect from the assigned claims the amount of the judgment and interest. The rule of law contended for is well established, but from what we have already said it has no application to the facts of this case. The rule goes no further than to hold that a debt presently due can not be extinguished by the payment of a smaller sum. If, however, there are additional considerations, the accord and satisfaction will be upheld as an extinguishment of the debt. In this case there was not only the additional consideration of the assignment of the claim of the corporation, George T. Wood & Company, which was in no wise a party to the Federal court judgment, but there was no attempted effort of payment of any definite sum, and the assigned claims were nominally larger than the judgment. 1 Corpus Juris 544, 545, and authorities cited. In such cases the reason for the rule contended for, that there is no consideration for the acceptance of a smaller sum in payment of a larger fixed sum, no longer exists.

What we have said concerning the nature of the agreement relied upon and the obligations which plaintiff assumed therein renders it unnecessary to consider the contention (b), since that contention is based upon the duties imposed upon a holder of collateral security only, which, as we have seen, are not the only ones assumed by plaintiffs under their contract of March 26, 1903. The case as presented is one where plaintiffs under that contract obligated themselves to do certain things, and while those things were being prosecuted to suspend any effort to collect the Federal court judgment from defendant, and they can not be permitted to say that because they refused or neglected to do those things defendant is deprived of his right to insist upon such suspension. Especially where, as in this case, such failure and neglect have permanently deprived defendant of ever collecting anything from the assigned claims.

We therefore conclude that the trial court took the proper view of this case, and its judgment dismissing the petition is affirmed.

Banner, et al. v. Asher, et al.

(Decided January 24, 1919.)

Appeal from Bell Circuit Court.

Deeds—Presumption of Validity.—Where a deed had been duly executed, acknowledged and recorded there is a presumption of its validity and regularity, to overcome which the evidence must be clear and convincing.

C. HURST and JAMES M. GILBERT for appellants.

WILLIAM LOW for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellant/s brought this suit to set aside a deed executed by William A. Robbins to T. J. Asher, which deed was duly acknowledged before two witnesses and recorded in the Bell county court, the signature being by mark. The appellants claim that the instrument so recorded was not the act or deed of their ancestor, and they ask that the same be set aside, cancelled and held for naught.

Appellants contend that the grantor could read and write and there is evidence to this effect in the record. The deed was typewritten and delivery made in the office of appellee Asher; appellee's secretary and son were witnesses to the deed. They testified that it was signed in their presence. The witness Serena states that the grantor requested him to write his name and witness his mark to the deed as it appears there, the grantor touching the pen for his mark, and that after it was executed by the grantor he (Serena) took it to the county clerk's office and certified it before the clerk.

It is urged in appellant's brief that there was no delivery of the deed by grantor. The proof does not sustain this contention. Besides, as stated in 13 Cyc. 734, "That a deed has been duly executed, acknowledged and recorded, is *prima facie* evidence of its delivery and acceptance." Any one asserting the contrary has the burden of proving it. 8 R. C. L., sec. 66.

Appellants insist the consideration is inadequate, and that the proof shows no part of the consideration was paid. The covenant in the deed is of special warranty. The conveyance is of the grantor's "right, title and interest to any and all lands to which he may claim through and by his father, James A. Robbins, deceased." This is most indefinite, because the evidence is anything but satisfactory as to the extent of the holdings of James A. Robbins. The status of his title does not appear. William A. Robbins was one of nine children. Both the quantity and quality of the estate are veiled in so much uncertainty we cannot say the consideration is inadequate. The fact that some of the witnesses testify they knew nothing of the payment of the recited consideration by no means proves it was not paid. The deed states it was paid.

We do not think the proof in this case sufficient to overcome the presumption of validity and regularity incident to the acknowledgment and recordation of the instrument. As said in *Rockcastle Mining, Lumber & Oil Co. v. Isaacs*, 141 Ky. 80, "To overcome a deed which purports to be signed and acknowledged by the grantors and is thereafter put to record, the evidence must be clear and convincing."

The evidence in this case does not conform to this rule.

The appellant, Vici Banner, was the wife of William A. Robbins. She did not join in the deed. Since the submission of this case she has filed an affidavit stating that this appeal was obtained without her knowledge or consent, and her motion to strike her name as appellant and dismiss the appeal, so far as she is concerned, has been sustained.

Under the pleadings and evidence in the record before us we do not feel authorized to set aside the ruling of the lower court. Therefore the judgment is affirmed.

Jenkins, et al. v. Dawes, et al.

(Decided January 24, 1919.)

Appeal from Garrard Circuit Court.

1. Appeal and Error—Finding of Chancellor.—The views of the chancellor will not be disturbed upon appeal where the evidence is con-

ficting and the court is not convinced that the chancellor erred to the prejudice of the substantial rights of appellant.

2. Deeds—Performance of Contract to Convey.—The execution of a deed by grantor to a third party, at the instance and request of grantor, will be considered the performance of the contract or agreement of grantor to convey.
3. Deeds—Tender.—A tender or execution of a deed is proper when made to the person directed by the purchaser to receive it.
4. Specific Performance—When Will Not Be Decreed.—Where the performance of a contract is in fact impossible and its decree of specific performance cannot be enforced the court will deny the remedy. In this case grantor had only a defeasible fee and the specific performance of a contract to convey a fee simple title cannot be decreed.

L. L. WALKER and WILLIAM HERNDON for appellants.

P. M. McROBERTS and J. E. ROBINSON for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellants are seeking specific performance of a contract dated February 20, 1906, wherein appellees, who are husband and wife, covenanted to convey to C. M. Jenkins, ancestor of the appellants (hereinafter referred to as decedent), in fee simple, a tract of 157.77 acres in Garrard county, known as the "Burnt Tavern Place."

By a subsequent agreement the price to be paid by decedent for said land was increased \$1,400.00. In March, 1910, decedent contracted to sell said land to Hamilton & Elliott. On June 14, 1911, decedent and appellees executed a deed to Hamilton & Elliott conveying the fee simple title to the above farm, but the grantees in this deed refused the tender thereof, brought suit against decedent, and recovered a judgment for \$1,400.00 damages because of his inability and failure to convey a fee simple title.

The parties to this appeal have been involved in a number of law suits, two of which have come to this court.

In our opinion the judgment of the chancellor should be upheld. The appellee, Mrs. Dawes, was the daughter of David F. Smith, who died in 1881; through deed and will she received the farm above referred to and in a suit to settle the estate of her father it was adjudged she had a defeasible fee in said farm. Decedent was the executor of the will of David F. Smith and brought the above suit to settle his estate.

In 1902, an agreed case was filed in which the decedent and the present appellees were parties, and in the judg-

ment in this case it was decreed that Mrs. Dawes had a fee simple title to the farm.

In 1913 D. V. Jenkins, executor of the will of C. M. Jenkins, brought suit to settle his decedent's estate, in which suit it was alleged that decedent was the owner of two tracts of land in Garrard county, one 32 acres and the other 77 acres, but no reference was made to the 158 acre farm. Mrs. Dawes filed her claim in this case for balance due her as rent for use of said farm for the years 1911 and 1912, and this claim was verified by the executor of C. M. Jenkins' will, and one of the appellants to this appeal, by the use of the following language: "Affiant, D. V. Jenkins, states that he believes the foregoing claim to be just and correct. He states that his reason for believing the claim to be just and correct is he knows that decedent rented and used the land as shown by the above affidavit."

Mrs. Dawes, at the solicitation and request of the appellants, D. V. Jenkins and C. T. Jenkins, became the purchaser of the two tracts of land sold and there is evidence to the effect that in their conversation with appellees they conceded the ownership of Mrs. Dawes in the 158 acre tract. This was in 1913. Mrs. Dawes testified that she would not have purchased either of these smaller tracts had there been any question about her title to the larger one, or had she known appellants were claiming any interest in same.

In the latter part of 1913, appellants brought suit for something over twelve thousand dollars damages against the appellees because of their inability and failure to convey a fee simple title to Hamilton & Elliott, and in this suit the appellees filed a very voluminous answer setting up the history of the farm and the several law suits pertaining thereto, and among others the agreed case in which it was adjudged that the appellees had the fee simple title to the farm. A demurrer to this answer was filed and overruled, and later the case was dismissed without prejudice.

In 1914, the appellant, D. V. Jenkins entered into an agreement with appellee, B. A. Dawes, by the terms of which the former agreed to cultivate the land of Mrs. Dawes on shares for the year 1914. This included the 158 acre farm. In October, 1914, a tender of \$8,326.50 was made by certain of the appellants to appellees, and at the same time they demanded that appellees execute a deed to

the farm. Failing to receive a deed, this suit was filed November 2, 1914.

Appellants contend that certain payments made by decedent were for interest on the note referred to in the contract of 1906; appellees claim the payments were for rent.

There is proof supporting both contentions, but the weight of the evidence, in our opinion, indicates these payments were for rent. Appellees in their testimony on one or two occasions refer to the payments as being on account of rent, later correcting these statements, saying they were for interest. D. V. Jenkins, in his re-cross-examination, was asked the following question and made the answer indicated. "Q. What do you call it? A. I paid it as rent or interest either." It is well settled in this state that this court will not disturb the findings of a chancellor where the evidence is conflicting and the court is not convinced that the chancellor has erred to the prejudice of the substantial rights of the appellant. *Manchester National Bank v. Gerndon*, 181 Ky. 117; *Herzog, et al v. Gipson, et al.*, 170 Ky. 321. But, aside from this, when the appellees, at the request of decedent, joined him in a deed to Hamilton & Elliott they performed their part of the contract and a specific performance will not be decreed against them.

In the petition in this case will be found the following language: "After decedent sold said lands to Hamilton & Elliott, as hereinbefore, said decedent requested the defendants that instead of making the deed to him directly, conveying to him the fee simple title thereto, they join in with him and make a deed directly to Hamilton & Elliott. This defendants agreed to do, and thereupon the decedent and the defendants, by their deed duly executed, signed and acknowledged, . . . did convey said lands to said Hamilton & Elliott in fee simple, with covenant of general warranty of title."

A tender is proper when made to the person directed by the purchaser to receive it. 39 Cyc. 1548. This text is supported by *Smith v. C. & N. W. Ry. Co.*, 18 Wis. 17; *Webster, Admr. v. Tibbitts, et al.*, 19 Wis. 438. In the latter of the above cases the court uses this apt illustration: "If A owes B a sum of money upon written promise to pay, and afterwards B directs A to pay the money to C and A does so, it is a satisfaction of the debt. So if A covenanted with B to convey to him a tract of land and

B subsequently requests A to convey the land to C and A does so, it is a satisfaction of the covenant."

Appellees have performed their contract in the manner and method requested by decedent. This is shown by the allegations in the petition, and is borne out by the facts in this record; more, they cannot be compelled to do.

As said in *Blue Grass Realty Building v. Shelton*, et al., 148 Ky. 666, "A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course but is granted or withheld according as equity and justice seem to demand in view of all the circumstances in the case. See *Elliott on Contracts*, sec. 2284; *Story's Equity*, sec. 750."

It is further evident from the proof in this case that the decedent, during his lifetime, and the appellants, since his death, have at all times been thoroughly familiar with the character of the title vested in Mrs. Dawes

In *Jenkins, et al. v. Hamilton & Elliott, et al.*, 153 Ky. 163, the court sustained a judgment for \$1,400.00 damages against C. M. Jenkins, holding that Mrs. Dawes did not have the character of title which Jenkins covenanted to convey. In other words that she had a defeasible fee. With this character of title fixed by the court it would be impossible to enter a judgment in compliance with the prayer of the petition in this case, viz.: That the appellees convey the lands to the appellants by a deed in fee simple with covenant of general warranty.

Where the performance of a contract is in fact impossible and a decree for specific performance cannot be enforced, the court will deny the remedy. *Elliott on Contracts*, sec. 2285.

For the foregoing reasons the judgment is affirmed.

Carter Coal Company v. Bays.

(Decided January 24, 1919.)

Appeal from Knox Circuit Court.

1. **Appeal and Error—Pleading.**—Where after a judgment it is manifest the trial proceeded as if certain pleadings were filed and instructions given accordingly, this case on appeal will be treated to all intents and purposes as if said pleadings were actually filed.
2. **Appeal and Error—Instructions—Plea of Contributory Negligence.**—From the instructions given it is evident the court treated an

answer as filed. The answer contained a plea of contributory negligence. This plea should have been covered in the instructions given, the case having been treated as if the answer was filed, and it was error to refuse a tendered instruction on contributory negligence.

BLACK & OWENS for appellant.

J. D. TUGGLE and J. B. CAMPBELL for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

The record in this case is unique. Appellee (plaintiff below) recovered judgment in the sum of \$700.00 for injuries caused through the alleged defective ventilation of appellant's mine. The record, certified by the clerk, shows the filing of the pleadings and orders usual in such cases. Some time after the case had been submitted in this court, and briefs filed, appellee filed a motion to set aside the submission and to correct the record by striking therefrom what purported to be the order filing a demurrer and the submission thereon; the order filing an answer, the answer itself, and the order controverting of record the affirmative allegations of the answer.

The affidavit of the circuit clerk is filed, and he states that the above orders and pleadings were erroneously copied; that his record does not show any such were filed; indeed, the order controverting the affirmative allegations of the answer he says was copied from the record in an entirely different case. It appears from the affidavits that at the time the case was called for trial no answer had been filed. Counsel for appellant insisted, however, that an answer had been filed and he had a carbon copy in his office and time was given for him to go to his office and get this carbon copy which, it appears, he did.

Appellee brought suit against the appellant on a previous occasion, growing out of the accident complained of in the instant case, and this case had been called for trial and evidence introduced when it was dismissed by the plaintiff. The carbon copy of the answer brought to the court was doubtless a copy of the answer filed in the previous case, and it seems that while there is no order filing this answer the court treated it as having been filed. This being true this court will assume that to all intents and purposes the case was tried as if the answer had been filed.

In submitting the case to the jury the court gave four instructions, and it is evident from the wording of the first instruction the court treated this case as one in which the parties had pleaded to an issue. Instructions are required to be based upon the pleadings and the evidence. See *Bauer Cooperage Co. v. Shelton*, 114 S. W. 257.

In *Burchett v. Herald, &c.*, 98 Ky. 530, the court holds: "The sole question presented by this appeal is whether, on the face of the petition, and on the allegation made as to the damages, the court was authorized to render judgment without evidence either to the court or to a jury for the amount claimed in damages. This question has often been decided by this court in the negative." See Civil Code, sec. 126, subsec. 4.

In tort cases the effect of a failure to answer is an admission of plaintiff's right to recover, but same will not be treated as an admission of the amount of damages, if any, to which the plaintiff is entitled; hence it is necessary to submit the question of the amount of damages to a jury, under proper instructions, and these should limit the recovery to such damages as are claimed or may be justified from the allegations of the petition. In the absence of an answer the court would have instructed the jury as above indicated, but from the instruction given it is manifest the court considered the case as at issue.

Fitzpatrick v. Vincent, 28 Rep. 121, was a suit to enforce a lien retained in a deed, and it appears that no reply was filed to an allegation in the answer that the sale was champertous, but inasmuch as both parties took proof on the issue, without objection, and appeared to have submitted the case on the merits, and there was no motion for a judgment on the pleading, the court says, in substance, that after a judgment on the merits, where the parties treated the issues as made up, it must be presumed that the amended answer was taken as controverted of record, and that the order, by some oversight, was not entered.

Ford Lumber Etc., Co. v. Burt & Brabb Lumber Co., 157 Ky. 706. In an order entered in this case reference is made to a demurrer filed to plaintiff's petition, which was sustained, but the defendant insisted that it filed no demurrer to the petition and, therefore, the judgment was void. In passing on this point the court says:

"We must presume upon this record that the defendant demurred to the petition, but did not file a demurrer

in writing, and that the court acted on the demurrer, overlooking the fact that it had not been reduced to writing and filed. In *American Wire Nail Co. v. Bayless*, 91 Ky. 103, it was held, that although one of the defendants did not demur and the court, when the case was submitted *sua sponte*, raised a demurrer to the pleading and dismissed it on the ground that it did not state sufficient facts, the judgment was valid and was affirmed."

Had the clerk dated any of the orders he would doubtless have discovered the incorrectness of the record filed in this court, the erroneous parts of which are now sought to be stricken from the transcript, but this he did not do.

What is said about the answer applies with equal force to the order controverting the affirmative matter of record. The answer in the second paragraph pleads contributory negligence, but instructions tendered by the appellant covering this and other defenses were refused by the court. This was error. If the court considered the answer as filed for one purpose it was filed for all purposes. This being true the court erred in not giving an instruction on contributory negligence to the jury.

The motion of appellee to correct the record is overruled. Upon the return of the case the court will see that an order is entered filing the answer, and likewise the order controverting the affirmative allegations of the same.

Wherefore the judgment is reversed for further proceedings consistent with this opinion.

Western & Southern Life Insurance Company v. Weber.

(Decided January 24, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas, Second Division).

1. **Statutes—Construction—Intent.**—In the construction of statutes the intention of the legislature in enacting them must prevail, and such intention is to be gathered from the words which the legislature employed. If those words are distinct, plain and unambiguous they must be given effect, although such construction might curtail the application of the statute so as to partially defeat the general purpose which the legislature had in view, since it is the duty of courts to construe that which is written and

not to amend, change or alter a plainly written statute so as to make it accomplish some supposed purpose of the legislature in enacting it.

2. Insurance—By-Laws Attached to Application—Evidence.—Section 679 of the Statutes requiring applications, by-laws and other documents (or copies thereof) referred to in a policy of insurance to be attached thereto and forbidding the introduction of such documents as evidence in any action upon the policy unless so attached does not apply when the policy makes no reference to such application, by-laws or other documents.
3. Insurance—By-Laws Attached to Application.—Neither do the provisions of section 656 of the Statutes require such documents to be either attached to or contained in the policy, since that section treats of and relates only to rebates.

HUGH B. FLEECE for appellant.

J. M. CHILTON for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

On March 29, 1915, the appellant and defendant below, Western & Southern Life Insurance Company, issued a policy to the appellee and plaintiff below, Katherine Weber, by which it agreed in consideration of the payment of stipulated weekly premiums to pay to plaintiff as beneficiary, upon the death of her husband, John L. Weber, the sum of \$200.00, upon certain conditions named in the policy, only one of which is here involved and will be hereinafter referred to. On October 10 of the same year John L. Weber died, and defendant failing to pay the amount of the policy after proof of death, plaintiff filed this suit to recover the amount of the policy, and upon trial there was a judgment in her favor for the sum of \$200.00. Complaining of the judgment, the defendant has filed a transcript of the record in this court, accompanied by a motion for an appeal.

The first paragraph of the answer is a denial of certain allegations in the petition. The second paragraph pleads in substance that plaintiff made written application for the policy and stated therein among other things that her husband, the insured, was only 49 years of age, and that it relied upon that statement and issued the policy, which it would not have done had it known that the statement was false and fraudulently made; that in truth and in fact her husband was at that time 56 years of age. It further alleged that according to its method

of business in issuing that character of policy (which is known as an industrial one) it did not require a medical or physical examination of the insured when he was under fifty years of age, but that such examination was required when the age of the insured was above fifty years, and that if the true age had been stated an examination would have developed that he was insane at the time and actually confined as an inmate of the Central State Hospital at Lakeland, Kentucky. A third paragraph alleged that the policy itself contained a provision that it would be void if the insured had or ever had any disease of the brain, and that at that time he was not only afflicted with such disease, but had been so for a considerable time prior thereto. A demurrer was filed and sustained to those two paragraphs, and defendant declining to plead further, judgment was rendered against it.

The ruling of the court in sustaining the demurrer was bottomed upon the idea that the defenses relied upon in the two paragraphs in question were not available, since it was held that they grew out of statements and representations made in the application for the policy, and neither the application nor a copy thereof was attached to the policy as required by the provisions of sec. 679 of the Kentucky Statutes. The policy sued on nowhere contains any reference to the application or by-law or other paper or document as forming part of the insurance contract between the parties, or as having any bearing thereon; so the question is whether the court was correct in concluding that the section of the statute, *supra*, applied to the facts of this case. That section, so far as pertinent to the question involved, reads:

“All policies or certificates hereafter issued to persons within the Commonwealth of Kentucky by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the by-laws, or the rules of the corporation, either as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, shall have such application, by-laws and rules, or the parts thereof relied upon as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, attached to the policy or certificate, or printed on the face or reverse side thereof, and unless either so attached and accompanying the policy, or printed on the face or reverse side thereof,

shall not be received as evidence in any action for the recovery of benefits provided by the policy or certificate, and shall not be considered a part of the policy, or of the contract between the parties."

Prior to the enactment of that statute in 1893, the rule prevailed without exception, so far as we are aware, that an insurance company in a suit upon a policy issued by it might rely upon the written application made for the policy or any by-law or constitution of the company as forming a part of the contract and bearing thereon. although neither the original nor any copy thereof was contained in, referred to, or attached to the policy. This rule was so general that we deem it unnecessary to make reference to the authorities, except the two late cases from this court of Grand Lodge A. O. of U. of Kentucky v. Denzer, 129 Ky., 202, and Supreme Council C. K. A. v. Fenwick, 169 Ky. 269. Hence, were it not for the statute, the defendant in suits like this could rely upon any matters contained in documents of the character referred to in the statutes, regardless of whether they or any copies thereof were attached, referred to or contained in the policy, and this right still exists unless prevented by the statute. We are therefore called upon to determine whether the provisions of the statute apply to and include applications, by-laws, &c., not referred to in the policy.

Many rules exist as guides to the court in construing statutes, chief among which is that the intention of the legislature shall prevail. Another of equal dignity and as firmly fixed in the law is that no intention shall be read into the wording of the statute contrary to the plain meaning of the language employed. Setting forth the latter rule, Sutherland on Statutory Construction, second edition, by Lewis, section 367, says:

"When the intention of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction. It is not allowable to interpret what has no need of interpretation. To attempt to do so would be to exercise judicial (legislative) functions. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. These views of eminent courts are supported by numerous cases. When the meaning of a statute is clear, its consequences, if evil, can only be

avoided by a change of the law itself, to be effected by the legislature and not by judicial construction." In support of the text cases are cited from almost every state in the union, including many from the Federal courts, among which is that of *Robertson v. Robertson*, 100 Ky. 696, in which Judge Lewis, speaking for the court, among other things, says:

"When a statute is plain and peremptory there is nothing for the court to do but to enforce it as it is written."

So imperative is this rule that, as stated in sec. 366 of the work by Mr. Sutherland, *supra*: "We are not at liberty to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting, and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence." Further along in the same section the same rule is expressed in this language: "The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases can not be included or excluded merely because there is intrinsically no reason against it. Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. . . . Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result is out of place. It is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense."

These rules were early adopted by this court in the case of *Bosley v. Mattingly*, 14 B. Mon. 73, where, in the opinion delivered by Judge Simpson, it is said:

"It may be proper in giving a construction to a statute to look to the effects and consequences, when its provisions are ambiguous, or the legislative intention is doubtful. But, when the law is clear and explicit, and its

provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial action.' To the same effect is Endlich on the Interpretation of Statutes, secs. 127 and 128.

Another rule for the construction of statutes which we think under the unambiguous wording of sec. 679 should be applied is that embodied in the maxim: "*Expressio unius est exclusio alterius*" (Broom's Legal Maxims, star page 581, and Sutherland on Statutory Construction, *supra*, secs. 491-494) since the section by expressly confining its provisions to applications, by-laws, &c.—a reference to which is contained in the policy—necessarily excludes from its provisions such documents when they are not referred to in the policy.

Applying these rules to the language of the section under consideration, we are forced to the conclusion that it has reference to and includes only applications, by-laws, constitutions, &c., which are referred to in the policy as containing a part of the contract. The express words of the section only purport to treat of such application and other documents as the policy refers to, and necessarily if it contains no reference to such papers they occupy the same relation to the rights of the parties as they did before the statute was enacted.

It might be said that this construction of the statute largely impairs the beneficial results and frustrates the purpose intended to be accomplished by the legislature in its enactment, but the answer is to be found in the language hereinbefore quoted that "Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity."

The judiciary is but one of the three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the legislature had in view, the remedy is legislative action and not judicial construction.

Many cases from this court have had under consideration the section of the statute here involved, but in none of them has the question now before us been presented or determined. In each of the cases heretofore coming to

this court there was a reference made in the policy to the non-attached papers, and of course those cases came directly within the express words of the statute. The precise question, however, has been adjudicated by the highest courts of Massachusetts and Oklahoma in the two cases of *Holden v. Prudential Insurance Company of America*, 191 Mass. 154; *Continental Casualty Company v. Owen*, 38 Okla. 107, and by the United States Circuit Court of Appeals for the Third Circuit, in the case of *Hews v. Equitable Life Assurance Society*, 143 Fed. Rep. 850. The statutes involved in those cases were identical with ours in requiring the applications, &c., which were referred to in the policy, to be attached thereto, and in passing upon the question the Massachusetts Supreme Court said:

"While the language of the statute is broad enough to prevent the use of an application to prove fraud, when the policy refers to an application and it is not attached to the policy, there is no reason for extending the statute by construction, so as to make it prevent the proof of fraud by an application, when the policy contains no reference to an application. It is not the policy of the law to create unnecessary obstacles to the proof of fraud."

The court in the two other cases cited used substantially the same language, holding that if there is no reference in the policy to the non-attached papers, there is no obstacle in the way of their use by the defendant to prove fraud vitiating the policy. We therefore conclude that the court erred in sustaining the demurrer to paragraphs two and three of the answer.

For an additional reason it was error to sustain the demurrer to the third paragraph of the answer. As a defense it relied upon matters appearing both in the application and the policy, the latter containing this condition: "and shall be void (the policy) if the insured . . . has had before said date (of the policy) any . . . disease of the brain." Even if the statute which we have considered had been applicable to the facts of this case, a violation of it would not have prevented this defense, since it is one, as we have seen, based upon a condition contained in the policy, for "the failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense that it may have under the express terms of the policy without reference to the application." 14 R. C. L. 886.

Neither can the judgment be sustained under the provisions of sec. 656 of the statutes, since it purports to and does deal only with rebates.

We therefore conclude that the demurrer to paragraphs two and three of the answer should have been overruled, and the motion for the appeal is sustained, the appeal granted, and the judgment is reversed for proceedings consistent herewith. The whole court sitting.

**Sanitary Laundry Company v. Adams, By Next Friend,
etc.**

(Decided January 24, 1919.)

Appeal from Kenton Circuit Court
(Common Law and Equity Division).

Master and Servant—Employment of Infant in Violation of Statute.—If a master employs a servant contrary to the provisions of the child labor law (sec. 331a, Ky. Statutes) he is liable for all damages sustained by the infant having a causal connection with his employment, and this liability is not relieved by the infant servant misrepresenting his age at the time of the employment, although the master believed such representations and engaged the servant in good faith upon that belief.

S. D. ROUSE for appellant.

SAMUEL W. ADAMS for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The question involved in this case is purely a legal one, and is whether an infant under the age of sixteen years may be estopped to insist that she was employed contrary to the provisions of the child labor law forbidding the employment of infants under sixteen years of age in certain employments. The particular law involved is subsection 9 of section 331a of the Kentucky Statutes.

The facts are that appellant (who was defendant below) is a corporation operating a laundry in the city of Covington, Kentucky. Some time in June, 1916, defendant employed appellee, Virginia Adams (who was plaintiff below) to work in its laundry. In August following plaintiff sustained injuries to one of her hands, which were inflicted by the machine at which she was working,

known as a mangle. She brought this suit by next friend against the defendant, seeking to recover damages for the injuries which she sustained, and upon trial recovered a judgment for \$1,250.00, and complaining of it defendant prosecutes this appeal.

Plaintiff's pleading, as amended, alleged that she was under the age of sixteen years at the time she was employed, which allegation, as well as others charging liability, were denied, and by a separate paragraph it was alleged that plaintiff represented to defendant at and before the time she was employed that she was above sixteen years of age and that defendant relied upon such representations and but for which it would not have employed her, and these facts were relied on as constituting an estoppel. A demurrer was sustained to this paragraph, and the defense sought to be interposed thereby was denied throughout the trial. Upon this alleged error defendant chiefly relies to secure a reversal, for it is insisted that if plaintiff is denied the benefit of the plea of infancy because of her representations, defendant may avail itself of all defenses, including those of assumed risk and contributory negligence, which it insists are abundantly established by the testimony.

It has been held by all courts, so far as we are aware, that where a master employs an infant in contravention of a statute, and the infant sustains injuries proximately resulting from and having a causal connection with the employment, the master is liable and can not escape such liability through the intervention of any ordinary defenses available against adults, including the affirmative ones of contributory negligence, assumed risk, &c. *Inland Steel Company v. Yedinak*, 172 Ind. 423; *Marion v. Lehmaier*, 173 N. Y. 530; *Iron, &c., v. Greene*, 108 Tenn. 161; *American Car, &c. Co. v. Armentraut*, 214 Ill. 509; *Perry v. Toser*, 90 Minn. 431; *Same*, 101 Amer. St. R. 416; *Sullivan v. Hanover Cordage Co.*, 222 Pa. St. 40; *Sipes v. Mich. Starch Co.*, 137 Mich. 258; *Leathers v. Blackwell, &c., Tobacco Co.*, 144 N. C. 330; *Same*, 9 L. R. A. (N. S.) 349, and *Louisville & Henderson Ry. Co. v. Lyons*, 155 Ky. 396.

In the Lyons case, above referred to, this court had under consideration the effect of the employment of infants contrary to the provisions of our statute, *supra*, and, after considerable discussion in which cogent reasons for denying the defense are stated, summed up its conclusion by saying:

"We therefore hold that neither the doctrine relating to assumed risk or fellow servants or contributory negligence has any place in the application of this statute. The employer takes all the risk, the child none. It is true this construction makes the employer an insurer of the safety of the child, and so he should be. The lives and limbs of children are too valuable to be sacrificed in dangerous employments, and if an employer in violation of the statute engages the services of a child in such an employment, he must see to it that no harm comes to him, or if it does he must compensate him, in so far as money can do, for the injury inflicted."

The same construction had been given to the statute in the prior case of *Casperson v. Michaels*, 142 Ky. 314.

The court in the present case submitted to the jury only the issue as to whether plaintiff was under sixteen years of age at the time she was employed, and refused to submit any of the affirmative defenses relied on, upon the ground that plaintiff's representation as to her age did not through the doctrine of estoppel give defendant the right to rely upon such defense, and in support of the contention that this was error, the case of *County Board of Education v. Hensley*, 147 Ky. 441, is relied on.

In that case an infant who had all the appearances of being twenty-one years of age deeded to his vendee a tract of land, representing himself at the time to be above twenty-one years of age. He afterwards sought to avoid the deed and brought a suit to recover the land. Among the defenses interposed was one that he not only represented himself to be twenty-one years of age at the time he executed the deed and received the consideration therefor, but he stood by and saw his vendee erect a building upon the lot at a cost of \$500.00 without objection or protest. It was shown that the infant had been engaged in business for himself for several years, and that he had bought and sold land. It does not appear that he offered to tender back the consideration, and under the circumstances this court held that he was estopped to avoid the deed. There are other cases from this court holding that under peculiar and similar circumstances to that case an infant would be estopped, especially if he had rendered himself unable to restore the consideration. But it does not necessarily follow that because this court in such cases, contrary to the general rule upon the subject, (22 Cyc. 512; *idem*, 610, 611) applies the doctrine of estoppel

to infants that a master may plead estoppel against his infant servant, who was employed contrary to statutory provisions, so as to obtain the benefit of defensive pleas which would have been applicable but for the infancy of the servant. To so hold would result in indiscriminate evasions of the statute and permit the parties to accomplish by indirection that which is expressly prohibited by the statute in furtherance of a wholesome public policy. The courts quite generally have declined to permit this to be done. *LaBatt's Master and Servant*, 2nd Edition, vol. 5, sec. 1903; *Braasch v. Michigan Stove Co.*, 163 Mich. 652, 20 L. R. A. (N. S.) 500; *American Car and Foundry Co. v. Armentraut*, *supra*; *Swift v. Rennard*, 119 Ill. App. 173; *Beauchamp v. Sturges & Burn Mfg. Co.*, 94 N. E. (Ill.) 204; *Krutlies v. Bulls Head Coal Co.*, 249 Pa. 162; *Same*, 1915 F., L. R. A. 1882; *DeSota Coal Mining and Development Co. v. Hill*, 179 Ala. 186, and *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320.

The law upon the subject as held by the great majority of cases is summarized in the section, *supra*, of *LaBatt's Master and Servant*, thus: "It is generally held that the right of action arising from a violation of these statutes is not affected by misstatements as to the minor's age. This might be put upon the ground that infants are not liable for torts connected with or growing out of their contracts, and that the doctrine of estoppel *in pais* is not applicable to them. . . . The courts, however, have not been inclined to allow misstatements of age by a minor as a defense to his action."

In the *Beauchamp* case, *supra*, before the Supreme Court of the United States, upon this point that court said: "It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith relying upon the representation made by *Beauchamp* that he was over sixteen. It is said that, being over fourteen, he had at least attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the state, in securing the safety of the young, to prohibit such employment altogether, it could select means appropriate to make its prohibition effective, and could compel employers at their peril to ascertain whether those they employed were in fact under the age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government."

It would therefore seem that upon authority as well as upon reason the defense of estoppel herein urged could not prevail. There was sufficient evidence to authorize the jury to find that plaintiff was at the time of her employment under the prohibited age, and there is no serious criticism upon the size of the verdict, as indeed there could not well be, since plaintiff's hand is largely destroyed.

We would not be understood at this time as applying the principles herein announced to any case except to the specific one of a suit by an infant servant against his master to recover damages for injuries sustained by the infant while engaged in serving the master when he was within the prohibited age.

Wherefore the judgment is affirmed.

**National Council of the Knights and Ladies of Security
v. Dean.**

(Decided January 24, 1919.)

Appeal from Hickman Circuit Court.

Insurance—Application for Life Insurance—Evidence.—Evidence that a girl about grown lived in the home with her mother during the time that her mother's menstrual periods ceased, and while her mother was ill and died of pulmonary tuberculosis, is some evidence that the daughter knew the statement she made in an application for life insurance that her mother died of "change of life" was not true.

J. S. VIA for appellants.

BENNETT, ROBBINS & ROBBINS for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

Appellant is a fraternal insurance society with a local council at Clinton, Kentucky, of which Susie E. Dean when she died on July 23, 1916, was a member in good standing and to whom appellant had issued, upon her written application therefor, a benefit certificate for \$1,000.00, payable to her father, the appellee, upon her death. Appellant having refused to pay to appellee the amount of the policy after receipt of proof of her death, he filed this action to enforce the payment.

Appellant as a defense alleged that in her written application the deceased falsely and fraudulently represented that her mother had died of "change of life" when as a matter of fact she died of pulmonary tuberculosis, and that a false representation about her family history rendered the policy void under the provisions of the society's by-laws, made a part of the insurance certificate.

The plaintiff denied that the statement made was false or fraudulent or material, and upon a trial of this sole issue the court at the conclusion of all the evidence directed a verdict for the plaintiff, and the defendant has appealed from the judgment entered thereon.

It was shown without contradiction that the insured's mother died of tuberculosis, and hence the court erred in directing a verdict in plaintiff's favor, if there was any evidence that the statement complained of was either fraudulently made or material. See section 639, Kentucky Statutes.

Defendant proved by Dr. Fred Beeler, that he treated the mother of Susie E. Dean for tuberculosis "a good many years before she died;" that Susie E. Dean was at the time and until her mother's death, living in the same home with her; that Susie was then a good sized girl, nearly grown, and when asked "if the entire family, including Susie, did not know that Sarah Dean (her mother) had consumption while you were treating her," answered "I said the family knew it. I never did talk to the girl. I don't think. I don't know whether the girl knew or not—I should think she would have." This witness further testified that Mrs. Dean had "passed through with the period of the change of life" some time before her death, and after Susie was about grown. It is shown by other witnesses that Mrs. Dean had been afflicted with tuberculosis for a long time, during which time the family consisted of the father, mother and Susie. This is certainly some evidence, though circumstantial, that the insured knew her mother died of tuberculosis, and not from the cause stated in her application, and that the false statement was knowingly and therefore fraudulently made, because it would be quite unusual and out of the ordinary if a grown daughter could live in the same home with her mother and not know that for years she was suffering and finally died from pulmonary tuberculosis, a disease most any person can usually detect almost at

sight of one afflicted with it, and also be ignorant of the fact her mother's menstrual periods had ceased.

This conclusion renders unnecessary a consideration of the materiality of the false statement.

Wherefore, the judgment is reversed, and the cause remanded for another trial consistent herewith.

Roberson, et al. v. Roberson.

(Decided January 24, 1919.)

Appeal from Ballard Circuit Court.

1. **Appeal and Error—Depositions—Failure to Except to.—**Evidence in a deposition, even though incompetent and to which objections were entered when given, can not be disregarded upon appeal where no exceptions were filed and the competency was not presented or passed upon in the lower court.
2. **Appeal and Error—Finding of Chancellor.—**The chancellor's judgment upon a question of fact will not be reversed where the evidence is not convincing and the mind is left in doubt.

J. B. WICKLIFFE for appellants.

HENRY TURNER for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

This is an appeal from so much of the judgment awarding appellee possession of about one-half acre of land, as dismissed the counterclaim of appellant, Julia Roberson, as administratrix of her deceased husband, Thornton Roberson, Jr., in which she sought a lien upon the land involved, which she alleged her intestate held under a parol gift from appellee, his father, for the amount its vendible value had been increased by the improvements erected thereon by the decedent during his occupancy.

1. The first question urged upon us, is as to the competency of the testimony of the appellant, Julia Roberson on the one side, and of appellee, Thornton Roberson, upon the other; but the objections to this evidence were simply made and noted at the taking of the depositions, no exceptions were thereafter filed, and the question was not presented or ruled upon in the lower court, hence the objections will be regarded as waived, and can not be considered or the evidence disregarded in this

court. Section 589, Civil Code. *Hancock v. Chapman*, 170 Ky. 99, 185 S. W. 813.

2. Upon the questions of fact involved as to whether the decedent held the land under a parol gift from his father, and made the improvements on same as claimed by appellant, or simply occupied the land as the tenant of his father, who furnished the material for the improvements, as claimed by appellee, the testimony is in substance as follows:

Julia Roberson testified that she heard appellee tell her husband that "the first seven acres on the road belonged to him, that he gave it to him, and to go ahead and build his home;" that appellee theretofore had made a will by which he told her he had devised these seven acres to her husband. Eula Roberson and Mary Green testified that appellee, a few days before his son died, said in their presence, he had given to him "seven acres of land, and that he could build upon it, and that he had built upon it." Alex Turner testified to the same effect, but his testimony is thoroughly discredited by impeaching witnesses.

All of this is denied by appellee, and he proved by his daughter, Mittie Durrell, that deceased told her at about the time the building was erected, that he built it, but his father furnished the money, and by Virgil Durrell, that the deceased told him a short time before he died, that he was going to move away from the land if his brother remained there, as there was not land enough there for both of them, and that there was but one team." All of the testimony shows that decedent, during all of his married life of about sixteen years, lived upon and as a tenant cultivated his father's land; that during the first eight years he lived in an old house, some of the materials of which were used in constructing the new one, which he occupied from the time it was built until his death; that both houses were in the same enclosure and near appellee's dwelling, with but one gate or entrance from the road, used by all parties.

In addition to this, it is rather conclusively shown that the father furnished the rough lumber and shingles, and although one witness testified for appellant, that he saw decedent pay for some of the material that went into the house, no witness contradicts the statement of appellee that he furnished the money to the decedent, with which to pay for same. As will be seen, the testimony

for appellant is that appellee gave to his deceased son seven acres of land, but there is no claim even that deceased ever took possession of or claimed seven acres, or that the house is on "the first seven acres on the road," or that he ever marked off or inclosed or listed any part of it for taxation, or had any possession or control of any part thereof, except the house in which he lived, and as to whether he occupied that as owner or tenant, there is no evidence whatever, except the testimony of his widow upon the one hand, and his father upon the other. It is therefore obvious that from a consideration of the evidence as a whole, it is very doubtful whether appellee ever gave the land by parol to his deceased son, and as to which built the house; and upon such testimony we would not be authorized to reverse the judgment of the chancellor. *Farmer v. Cornett*, 174, Ky. 560; *Bank of Willard v. Pa. & Ky. Fire Brick Co.*, 175 Ky. 192.

Wherefore, the judgment is affirmed.

Roundtree, et al. v. Meadors, et al.

(Decided January 24, 1919.)

Appeal from Whitley Circuit Court.

Appeal and Error—Omissions in Record—Effect.—Where portions of the evidence, bearing upon the questions involved, are omitted from the record on appeal, the judgment will be affirmed.

STEPHENS & STEELY for appellants.

ROSE & POPE for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

In February, 1914, Mary Roundtree and her husband, Eugene Roundtree, purchased from Alec Cornelius a farm located in Whitley county. The purchase price was \$3,500.00, of which the sum of \$2,245.65 was paid in cash, and the balance was represented by two notes, one for \$627.35, payable February 4, 1915, and the other for \$627.00, payable February 4, 1916, secured by a lien on the property. On July 11, 1914, Mary Roundtree and her

husband conveyed this farm to Hampton Meadors in consideration of the conveyance to them of a farm owned by Meadors, and his agreement to discharge the lien notes on the Cornelius farm.

This action was brought by the Roundtrees against Hampton Meadors and wife, and Maynard Meadors, a brother of Hampton Meadors, to set aside the transaction on the ground that Eugene Roundtree was an infant when the conveyance was made, and that the conveyance was obtained from plaintiffs by covin, misrepresentation and fraud. On final hearing, the chancellor held that plaintiffs were not entitled to the relief prayed for, and rendered judgment dismissing the petition. Plaintiffs appeal.

It appears from the clerk's certificate that four depositions, which were read and considered on the hearing below, are omitted from the record. Where portions of the evidence, bearing upon the questions involved, are omitted from the record on appeal, the judgment will be affirmed. *First State Bank of Irvington, v. Richardson*, 167 Ky. 771, 181 S. W. 611; *Bryant v. Stephens*, 175 Ky. 367, 194 S. W. 327.

Judgment affirmed.

Commonwealth, for the use of v. Manuel, Executor.

(Decided January 28, 1919.)

Appeal from Lewis Circuit Court.

1. **Wills—Lapsed Legacies.**—Under section 4843 of the Kentucky Statutes providing that where a devise of property has failed or is otherwise incapable of taking effect it shall not be included in the residuary devise but shall pass as in case of intestacy, where a devisee, who has been given the fee, dies before the testator, the property devised passes under the statute as if the testator had died intestate as to it.
2. **Wills—Construction of—Intention.**—The most prominent and controlling rule in the construction of wills is that the intention of the testator as it may be gathered from what is written in the whole will is absolutely controlling where the intention so gathered does not conflict with some rule of law.
3. **Wills—Construction of—Must be Read as a Whole.**—The will must be read as a whole and particular clauses, if in conflict with the intention of the whole instrument, must give way to this intention and be construed if possible in harmony with it.

4. Wills—Construction of—Extrinsic Evidence—When Admissible.—Extrinsic parol or written evidence is not admissible for the purpose of ascertaining what the testator intended to but did not say, or for the purpose of altering or contradicting the terms of the will or adding to or subtracting anything from it.
5. Wills—Construction of—Extrinsic Evidence—When Admissible.—But extrinsic evidence is competent for the purpose of showing the circumstances and conditions surrounding the testator at the time the will was executed, and his relations to the devisees and those excluded when the circumstances and conditions and such relations throw pertinent light on what the testator intended by what he did say in his will.
6. Wills—Construction of—Extrinsic Evidence—Admissibility of.—Extrinsic evidence is admissible not only to explain latent ambiguities in the instrument but to aid the court in arriving at the intention of the testator when upon a reading of the whole will the mind is left in doubt as to what the testator meant to say by what he did say, no matter what the nature or character of the defect or ambiguity in the arrangement, construction or phraseology of the will this doubt may arise from.
7. Wills—Construction of—Extrinsic Evidence—When Admissible.—Where the meaning of the will is so plain and the intention so clear as not to leave room for two opinions as to either, extrinsic evidence is neither needed nor admissible.
8. Wills—Construction of.—Where testator in one clause gave to his wife "the entire remainder of my estate, including all bonds, notes, accounts, mortgages, choses in action and other personal effects of whatsoever kind or character I may be seized, possessed or entitled to," this clause, standing alone, would give the wife a fee, and upon her death before the testator it would pass under section 4843 of the Statutes as undevisee estate; but when read in connection with clause 7 of his will in which he provided that "should there be any of my estate remaining after the foregoing provisions shall have been carried into effect," the wife took only a life estate under clause 4, and at the death of the testator it passed to the residuary devisees, according to the intention of the testator as expressed in the whole will.
9. Wills—Construction of—Life Estate With Power to Use More Than Principal.—The wife was given in clause 4 more than an ordinary life estate but less than a fee. She had the right to use not only the income but so much of the principal as might be needed and what was left passed to the residuary devisees.

SHIVELEY & VANCE, H. W. COLE and ALLEN D. COLE for appellant.

WORTHINGTON, COCHRAN & BROWNING for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Affirming.

On June 26, 1900, George M. Tolle made his last will and after his death, in July, 1911, it was probated in the Lewis county court.

In the first clause he made provision for the payment of his debts.

In the second he gave to his wife, Nancy E. Tolle, all of his real estate "to use, occupy, hold, enjoy and control, together with all rents and profits thereof, for and during the term of her natural life."

In the third clause he provided for the payment of his funeral expenses and the erection of a monument.

In the fourth clause he said: "Subject to the provision hereinabove mentioned, that is to say, after the payment of my just debts, funeral expenses, and erection of the monument and iron fence at our burial lot, unless the same shall have been placed there during my lifetime, I give, devise and bequeath to my said wife the entire remainder of my estate, including all bonds, notes, accounts, mortgages, choses in action and other personal effects of whatsoever kind and character I may be seized, possessed or entitled to."

In the fifth clause he directed that at the death of his wife the real estate be sold, and "the proceeds be appropriated and distributed as hereinafter stated." And then after setting apart a sufficient sum to pay the debts and funeral expenses of his wife he gave fifteen hundred dollars to the Methodist church, of which he was a member.

In the sixth clause he directed that after "the above provisions shall have been made I will and desire that my executor or other personal representative pay and deliver to each of the following named persons the sums respectively mentioned, to-wit: To Mellie Manuel, three hundred dollars (\$300.00); to Aggie Manuel, two hundred dollars (\$200.00); to Mattie Manuel, three hundred dollars (\$300.00); to Fanny Thompson, three hundred dollars (\$300.00); to Mat Thompson, three hundred dollars (\$300.00); to Bruce Thompson, two hundred dollars (\$200.00); to Nellie Thompson, two hundred dollars (\$200.00); to Nannie Thompson, two hundred dollars (\$200.00); to Ross Thompson, two hundred dollars (\$200.00); to G. M. Tolle, Jr., one hundred dollars (\$100.00); to P. E. Darnell, two hundred dollars (\$200.00); to D. C. McNeal, one hundred dollars (\$100.00). In case that there be not sufficient estate to pay

each of the twelve foregoing bequests in full, then in that event each of the said devisees shall have and receive his or her proportionable share according to the sums indicated to them respectively."

In the seventh clause he provided that "Should there be any of my estate remaining after each and all of the foregoing provisions shall have been carried into effect, I will, bequeath and devise the same to Mellie Manuel, Aggie Manuel, Mattie Manuel and Mat Thompson, each sharing equally in amount of said remainder, if any. The latter sum shall not, however, be determined and paid to the four last mentioned devisees or either of them until after the death of my wife's mother, Jane Gilbert, whom I desire to be supported and maintained out of my estate during her natural life. . . . In case that either of said last named twelve devisees be dead at the time this distribution is to be made his or her respective share shall pass to the lawful child or children, if any, of such decedent, but if there be no such child or children then such share shall go to the other said devisees or the lawful child or children of either, as the case may be."

Nancy F. Tolle, the wife of the testator, died after the execution of the will but before his death, and upon the death of George M. Tolle, who died without leaving children or their descendants, W. R. Manuel, who was appointed in the eighth and last clause, executor of the will, qualified as such and sometime thereafter the appellants here, who are the children of the brothers and sisters of George M. Tolle and his only heirs at law, brought this suit against the executor to recover for their use and benefit about seven thousand dollars, the amount that Nancy E. Tolle, the wife of the testator, was given under the fourth clause of his will.

The suit was brought and a recovery sought upon the theory that Mrs. Tolle was given the fee in the estate mentioned in clause 4, and as she died before the testator the estate bequeathed to her passed upon his death to his heirs at law under section 4843 of the Kentucky Statutes, reading as follows: "Unless a contrary intention shall appear by the will such real or personal estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in case of intestacy."

The lower court dismissed the petition of the heirs at law and they bring the case here.

The argument of counsel for the heirs at law is that by the fourth clause of the will the testator gave to his wife a fee simple estate in the property therein mentioned and as she died before he did the estate mentioned in this clause should be treated under the statute as if the testator had died intestate thereto, and this being so, his heirs at law were entitled to it. On the other hand, the argument for the executor is that Mrs. Tolle took only a life estate in the property described in clause 4 of the will and this being so, at the death of the testator it passed under clause 7 of his will as a part of the residuary estate to Mellie Manuel, Aggie Manuel, Mattie Manuel and Mat Thompson, the persons named in clause 7 as the residuary devisees and legatees.

Before, however, coming to consider the construction of the will for the purpose of determining which of these views should obtain we think it well to set down a few rules for the construction of wills that are firmly fixed and have been long and consistently adhered to by this court as well as others.

Among these rules the most prominent and controlling one is that the intention of the testator as it may be gathered from what is written in the whole will is absolutely controlling where the intention so gathered does not conflict with some rule of law.

Another rule is that the will must be read as a whole and particular clauses, if in conflict with the intention of the whole instrument, must give way to this intention and be construed if possible in harmony with it.

Another rule is that extrinsic, parol or written evidence is not admissible for the purpose of ascertaining what the testator intended to, but did not say, or for the purpose of altering or contradicting the terms of the will or adding to or subtracting anything from it, but such evidence is competent for the purpose of showing the circumstances and conditions surrounding the testator at the time of the execution of the will and his relation to the devisees and those excluded when the circumstances and conditions and such relations throw pertinent light on what the testator intended by what he did say in his will. In other words, this character of evidence is admissible for the purpose of enabling the court to put itself as nearly as can be in the position of the testator at the time he wrote the paper so that it may

be assisted in appreciating and understanding what he intended to say by what he said.

Out of a multitude of illustrative cases in which the rules we have announced have been fully stated, we select the following:

The leading case in the United States on this subject is *Smith v. Bell*, 6 Peters 68, 8 Law Ed. 322. In that case, as it appears from the opinion one Brittain B. Goodwin in his will said: "I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin; and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament." After his death, his widow, Elizabeth Goodwin, took possession of all the personal estate of the testator and had the same in her possession when she intermarried with Robert Bell; and after this she and her husband, Bell, retained the estate until Elizabeth Goodwin Bell died. After her death the question before the court was "whether, by the will of said Brittain B. Goodwin, said Elizabeth Goodwin had an absolute title to the personal estate of said Britain B. Goodwin, or only a life estate; and also, whether said Jesse Goodwin, by said will, had a vested remainder that would come into possession on the death of said Elizabeth, or was said remainder void?"

In determining this question and in holding that Elizabeth Goodwin took a life estate in the property and Jesse Goodwin the remainder in fee, the court, speaking through Chief Justice Marshall, said: "The first and great rule in the exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his last will shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them."

It is further said: "It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention."

And further it is said: "It is impossible to read the will without perceiving a clear intention to give the personal estate to the son after the death of his mother. 'The remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin.' Had the testator been asked whether he intended to give anything by this bequest to his son, the words of the clause would have answered the question in as plain terms as our language affords.

"If we look to the situation of the parties, to the motives which might naturally operate on the testator, to the whole circumstances, so far as they appear in the case, we find every reason for supporting the intention, which the words, giving effect to all, of themselves import.

"The only two objects of the testator's bounty were his wife and his son. Both must have been dear to him. . . ."

". . . All his feelings would prompt him to make, as far as was in his power, a comfortable provision for his wife during her life, and for his child after her decease. This he has attempted to do. No principle in our nature could prompt him to give his property to the future husband of his wife, to the exclusion of his only child. Every consideration, then, suggested by the relation of the parties and the circumstances of the case, comes in aid of that construction which would give effect to the last as well as first clause in the will, which would support the bequest of the remainder to the son, as well as the bequest to the wife. It is not possible to doubt that this was the intention of the testator."

In *McClelland v. McClelland*, 132 Ky. 284, this court, in laying down the rule that the intention of the testator must control and that it was admissible to show the situation of and the circumstances surrounding the testator, said: "This court has repeatedly decided that it is proper to consider the environments and the natural objects of the bounty of the testator, at the time of the making of the will, to enable the court to arrive at the intention of the testator in the construction of the will."

Again in *Reuling v. Reuling*, 137 Ky. 637, the court said: "In every case the intention of the testator must be sought, and to arrive at his intention we must construe the language of the will in the light of the circumstances surrounding him at the time the will was prepared."

In *Buschemeyer v. Klein*, 139 Ky. 124, the court said: "In seeking the intention of the testator as to the construction and interpretation that should be placed upon ambiguous terms or clauses in a will, the relation of the parties, the nature and situation of the subject matter, the purpose of the instrument, and the motives which might reasonably be supposed to influence him in the disposition of his property may properly be considered.

. . . The construction of a will, or any of its provisions, must be controlled by the intention of the party making it, and when that intention is ascertained from the whole instrument it should be adopted, and no rule of construction will be allowed to defeat the expressed or plain intention of the testator. General rules of construction will be followed when not inconsistent with the manifest intention of the testator; but, says Mr. Redfield: 'The court will place themselves as far as practicable in the position of the testator and give effect to his leading purpose and intention as indicated by the words of the will construed with reference to all attending circumstances,' "

Further it is said: "In the interpretation of a will, 'the intention of the testator is the first and grand object of inquiry, and to this object technical rules are, to a certain extent, subservient;' and when ascertained, and not contrary to law, it is controlling . . . The intention may be gathered from the instrument itself, as well as from the relation of the testator to the parties in interest, his family arrangements, and the circumstances which surround them. . . . The intention is to be

gathered from all parts of the will taken together, and not from detached portions. . . . And, to ascertain the intention of the testator, it is sometimes admissible to change the language of the will, to discard words as surplusage when they appear to be without meaning as used, to supply words, to transpose words, sentences, phrases and even paragraphs."

In *Watkins v. Bennett*, 170 Ky. 464, the court said: "In determining what is the proper construction to be placed upon the provisions of a will, it is a rule of substantially universal application that the intention of the testator, expressed in his will, must prevail, provided that intention is not inconsistent with the established rules of law. The courts must ascertain the intention of the testator and give it effect, if the intention is not contrary to law. . . .

"In arriving at the intention of the testator, the entire will and all of its provisions will be looked to, and if there are ambiguous terms or ambiguous clauses in a will, to ascertain the proper interpretations of them, the motives which can reasonably be supposed to have actuated the testator, the purpose of his making a will, the relations existing between the testator and devisees, the nature of his property, and the amount of it, may be looked to in aid of the language in ascertaining the intention of the testator."

In *Stephens v. Walker*, 8 B. Monroe 600, in speaking of the admissibility of extrinsic evidence, the court said: "Extrinsic evidence of the condition and circumstances of the property devised, and of the testator and devisee, is no doubt admissible, to aid in ascertaining the intention of the testator." And that "Extrinsic evidence of the intention is inadmissible for the purpose of supplying a devise or any other material provision, omitted by mistake, or to superadd any qualification to the terms used, or to evince a mistake in writing the instrument."

It is also said that, "To allow parol evidence to be introduced to vary the meaning of wills, by showing a different intention on the part of the testator, from that expressed in the will, would be in violation of a well established rule of evidence, and in direct opposition to the statute requiring wills devising real estate and slaves to be in writing. And although evidence of the situation and circumstances of the testator and devisee, and of the character and nature of the subject matter of the

devise may be adduced, to enable the court, by placing itself in the position of the testator, to arrive at a correct knowledge of his meaning and intention, and thereby place a proper construction on the will, yet such evidence is admissible only for the purpose of aiding in the construction of the language used, provided there is sufficient indication of intention appearing on the face of the will to justify its application. The inquiry must be confined to the meaning of the words used; and hence, all extrinsic evidence tending to prove, not what the testator has expressed, but what he intended to express, is inadmissible."

In *Allen v. Vanmeter*, 1 Met. 264, the court said: "It is now well settled that evidence of extrinsic facts is admissible in aid of the exposition of wills, although they are by statute required to be in writing, and are, for that reason, peculiarly within the general principle which excludes parol evidence which tends to contradict, add to, or explain the contents of written instruments. But this extrinsic evidence must always be such as, in its nature and effect, simply explains what the testator has written, and not what he intended to have written. In other words, the question in expounding a will is not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used."

It will, as we think, readily appear from these cases that the contention made by counsel for the heirs at law that the evidence offered and heard by the court in this case to show the circumstances surrounding the testator and his relations to his heirs at law as well as the two girls, whom he took to raise, and their children, was not admissible because there was no latent ambiguity in the will to be explained by parol evidence is not well taken. In no one of the cases referred to was there a latent ambiguity in the wills construed. For example, the will in the *Bell* case was perfectly free from any latent ambiguity and yet in that case the Supreme Court of the United States said parol evidence was permissible for the purpose indicated, and so in the other cases referred to.

Indeed so far as our investigation goes there is no difference of opinion in the books on the subject that extrinsic parol evidence of the character mentioned is admissible, not only to explain latent ambiguities in the in-

strument but to aid the court in arriving at the intention of the testator, when upon a reading of the whole will the mind is left in doubt as to what the testator meant to say by what he did say, no matter what the nature or character of the defect or ambiguity in the arrangement, construction or phraseology of the will this doubt may arise from. Of course if the meaning of the will is so plain and the intention so clear as not to leave room for two opinions as to either, there could be no need for evidence to explain the one or elucidate the other.

But it often happens that wills, free from any latent ambiguity and also free from patent imperfections or omissions, are yet so worded or arranged as to leave in doubt what the testator intended by what he said, and in all such cases extrinsic parol or written evidence showing the circumstances that surrounded him at the time of the execution of the will, his relation to the devisees, and other pertinent things, is competent to throw light on what he intended by what he did say. The will here in question furnishes a good illustration of what we mean. It is free from latent ambiguity and does not disclose any patent ambiguity, but yet it is so inaptly worded and arranged as to leave in doubt what the testator intended by what he said; but this doubt is removed when the court has an opportunity to read the will in the light of the circumstances surrounding the testator when it was written.

Coming now to the evidence, it shows without contradiction that George M. Tolle and his wife, Nancy, were married in 1861, and no children were ever born to them; that a few years after their marriage they took into their home two little girls named Mellie and Fannie Highfield; that they reared, educated and supported these two girls until they respectively married—Mellie to W. R. Manuel and Fannie to William Thompson; that Mellie is yet living and that Fannie died in 1908; that Mr. Tolle and his wife treated these girls at all times, both before and after they married, precisely as if they had been their own children; that after these girls married they settled in the neighborhood where Mr. Tolle lived and there their children, who are named in the sixth and seventh clauses of the will, remained and were living when Mr. Tolle and his wife died.

These two girls and their children were the natural objects of the testator's bounty. They were the per-

sons, with the exception of his wife, who were closer and dearer to him than any other, and they were the persons who it might reasonably and naturally be expected he would desire should be the beneficiaries of his estate when he and his wife died. The relations between the testator and his wife and the heirs at law, who are the children of the brothers and sisters of the testator, were never intimate or cordial. But the most conclusive evidence of the fact that the Manuels and the Thompsons were the natural objects of his bounty and the persons who he desired should have his estate after the death of his wife, is found in the will itself.

In this will, with the exception of one hundred dollars given to George M. Tolle, Jr., and one hundred dollars given to D. C. McNeal, not one cent's worth of property did he give to any of his heirs at law. The whole of it, except these two items and the sum given to the Methodist church, was bequeathed to his wife and the Manuels and Thompsons.

In the light of the law as we have stated it, and the undisputed facts as we have recited them, we now turn to the will to determine from it whether it was the intention of the testator to give his wife, by clause 4, the fee or only a life estate, with the remainder to the residuary legatees named in clause 7.

Standing alone and considered by itself without reference to the circumstances surrounding the testator at the time he made his will or the other clauses of the will there could be no doubt that under clause 4 the wife was given the fee simple title in the property therein mentioned, and it would of course necessarily follow from the statute that the heirs at law and not the residuary legatees would be entitled to this property.

But under all the authorities this clause should not be read alone, but in connection with and as a part of every other clause in the will, and then the whole will read in the light of the circumstances surrounding the testator, and with these aids his intention arrived at.

It will be observed that the testator, in clause 2, gave to his wife for life all of his real estate, and in clause 4, after the payment of debts, funeral expenses and the cost of a monument, the entire remainder of his estate of every kind and character. Plainly his wife was the first object of his bounty. He desired that she should be amply provided for during her life. She was not limited

to a life estate in the property described in clause 4, nor was she given the fee in this property. She was given the right to use all of it that she might need or desire to use. No limitation was placed upon her power to do this. She had in this property mentioned in clause 4 more than an ordinary life estate but less than the fee. In many wills clauses of this kind are found and when they are it is the uniform rule to construe them as giving to the devisee more than a life estate but less than the fee, or in other words, the right to use not only the income but so much of the principal as may be needed, and when all that has been needed is taken, what is left to pass to those who take in remainder. Examples of cases like this are: *Anderson v. Hall*, 80 Ky. 91; *McClelland v. McClelland*, 132 Ky. 284.

At the death of the widow the real estate in which he had a life interest was to be sold and disposed of as provided in clause 5, and then he said in clause 7 that if there should be any of "my estate remaining after each and all of the foregoing provisions shall have been carried into effect, I will and bequeath the same to Mellie Manuel, Mattie Manuel and Mat Thompson.

It will be observed that he did not say if there was any of his "real estate" remaining, or describe the estate that might remain, but he used words broad enough to embrace any kind of estate that might remain after the "other provisions" in his will had been satisfied, and plainly we think the testator had in mind in using the words "my estate remaining," whatever might remain out of the estate given to his wife in clause 4, after she was satisfied, as well as what might remain of the real estate after the charges on it had been satisfied. The testator had in mind that his wife might not need or use all he had given her in clause 4, and if she did not he wanted the Manuels and Thompsons to have what was left. This clause 7 is not to be limited to real estate. There is nothing in it or the will that would justify such limitation.

It is further plain that the testator intended to dispose of his whole estate, and it is equally clear that he did not intend that his heirs at law should have any of it except the small legacies he gave them, and to say that the bulk of his estate should now be taken from the objects of his bounty as expressed in the will and given by some technical construction to persons whom he did

not intend to have any of it, would do violence to the manifest intention of the testator as gathered from the whole instrument.

It may be true that by taking a narrow view of the will the construction contended for by the heirs at law would prevail, but when the whole will is looked at and all the competent and pertinent facts considered, there seems to us little room for dispute as to its proper construction.

According to our views as herein expressed the statute relied on by the heirs at law has no application because there was no undivided estate upon which the statute could operate.

Wherefore the judgment is affirmed. Whole court sitting.

Schroeder v. Coppin.

(Decided January 28, 1919.)

Appeal from Kenton Circuit Court (Criminal, Common Law and Equity Division).

1. Appeal and Error—Exception—Review.—In an action for assault and battery, the ruling of the court in placing the burden of proof on the defendant will not be reviewed in the absence of an exception.
2. Assault and Battery—Self-defense—Evidence—Sufficiency.—In an action for assault and battery, evidence examined and held to make the question of self-defense one for the jury.
3. Trial—Instructions—Requests—Necessity.—Where, in an action for assault and battery, the instruction on self-defense is correct, as far as it goes, plaintiff cannot complain of the court's refusal to give an instruction qualifying the right of self-defense, if the defendant brought on the difficulty by first striking the plaintiff, in the absence of a request therefor.

B. F. GRAZIANI for appellant.

R. G. WILLIAMS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Plaintiff, John Schroeder, brought this suit against the defendant, Clifford Coppin, to recover damages for

assault and battery. The jury returned a verdict in favor of the defendant and plaintiff appeals.

Plaintiff and defendant occupy adjoining residences. According to the evidence for defendant, plaintiff, on the morning of the difficulty, had been walking up and down the line fence between the two residences with a hatchet in his hand, abusing the defendant and his family. Directly, he took a seat in a chair on his porch with a paper in his hand, and applied a vile epithet to defendant and also to a negro working for the defendant. At that time, defendant was upstairs. He then went to the line fence and demanded that plaintiff apologize. Plaintiff had theretofore threatened defendant's life. When defendant asked for the apology, plaintiff sprang to his feet and started into the house to get a club, with which he had threatened defendant. Defendant grabbed the plaintiff in order to prevent him from getting the club. A scuffle ensued and they fell to the ground. Thereupon plaintiff bit defendant in the leg and defendant told him that if he bit him again he would hit him. Plaintiff did bite him again and defendant struck plaintiff two or three times. According to the evidence of plaintiff, he had not applied any insulting words either to the defendant or his negro employee. He was seated on his porch, reading the paper, when the defendant suddenly appeared and demanded an apology. On his refusing to make the apology, defendant assaulted and beat him. He had not threatened the defendant before, and made no effort at the time to get a club or any other weapon.

It is insisted that the court erred in refusing the plaintiff the burden of proof. It is not necessary to discuss this question further than to say that no exception was saved to the ruling of the court, and the propriety of its action will not be reviewed.

Another insistence is that plaintiff was entitled to a peremptory instruction. While it may be true that defendant's account of the affair bears the impress of improbability, yet if his evidence be true, he acted in self-defense, and whether it was true or not was a question for the jury.

In its first instruction, the court told the jury in substance to find for plaintiff, unless they believed from the evidence that at the time the defendant assaulted plaintiff, the defendant believed, and had reasonable grounds

for believing, that plaintiff was about to inflict some injury upon him, and that it was necessary, or appeared to defendant in the exercise of reasonable judgment to be necessary, to strike plaintiff in order to defend himself, in which event they should find for the defendant. This instruction is complained of because of the omission of a clause qualifying the right of self-defense, if the defendant himself brought on the difficulty by first striking the plaintiff. In reply to this contention, it is sufficient to say that the given instruction is correct as far as it goes, and plaintiff, who made no request for an instruction submitting the issue in question, cannot complain that such an instruction was not given. *Henry Clay Fire Insurance Co. v. Barclay*, 160 Ky. 153, 169 S. W. 747; *Cincinnati N. O. & T. P. Railway Co. v. Martin*, 146 Ky. 260, 142 S. W. 410.

Other errors are relied on, but we do not deem them of sufficient importance to merit discussion or to authorize a reversal.

Judgment affirmed.

Town of London, Kentucky, etc. v. Brown, etc.

(Decided January 28, 1919.)

Appeal from Laurel Circuit Court.

1. **Municipal Corporations—Classification—Assignment.**—Constitution, section 156, in providing for the classification of cities and towns confers upon the legislature the power to assign them to the classes, respectively, in which they should be placed, and after such assignment, when deemed necessary, to change or transfer them from one class to another. When this power has been exercised by the legislature in either particular, the courts must assume that it was properly exercised.
2. **Municipal Corporations—Classification.**—Where by an act of the legislature a city was assigned to the fourth class by specifically naming it with all others so named as belonging to that class, but by a subsequent legislative act amendatory of the first act, the name of the city was omitted in declaring the names of the cities composing the fourth class, such omission had the legal effect to make of it a town of the sixth class, because of the provision of the last section of the amendatory act by which it is declared "all other incorporated cities and towns not named in this bill shall belong to the sixth class."

3. Statutes—Municipal Corporations—Classification.—The act here in question (Acts 1916, page 619) is entitled "An act to amend section 2740 and section 2741 of article I, chapter 89, Ky. Statutes, Carroll's revised edition, 1915, relating to the classification of cities and towns," and makes in the act it is intended to amend two obvious changes, viz.: (1) it takes the city of Ashland from the fourth class and puts it in the third class; (2) it omits from the fourth class, where it had theretofore been placed, the town of London, which omission by virtue of the provisions of section 2741 of the act put it in the sixth class with all other towns not specifically named in any of the previous classifications. Section 2740, Ky. Statutes, as amended by the act of 1916, being repugnant to its former provisions, by implication repeals such of the former provisions as conflict with those of the act in its amended form.
4. Statutes—Municipal Corporations—Classification.—The act of 1916 is in no sense violative of section 51, Constitution. The subject expressed in the title has relation to but one thing or matter, viz.: the classification of cities and towns; and as all of its provisions relating to this one subject expressed in the title are germane to and naturally connected therewith, it meets every requirement of section 51, Constitution.
5. Municipal Corporations—Taxation.—As by the act, *supra*, London was made a town of the sixth class, it was without power to levy the tax of 75 cents on the \$100.00 complained of in this case; for section 3704, subsection 3, Ky. Statutes, enacted to carry out the provisions of section 157, Constitution, prohibits a town of the sixth class to levy a tax in excess of 50 cents on each \$100.00 of property subject to taxation. Consequently, it was properly enjoined from collection of the tax of 75 cents on the \$100.00 it had levied.

A. A. DYCHS and H. J. JOHNSON for appellant.

S. C. HARDIN and E. H. JOHNSON for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

At the suit of the appellees, B. F. Brown, George C. Brock, and Henry C. Hazelwood, resident citizens and taxpayers of the town of London, acting for themselves and in behalf of all other taxpayers thereof, an injunction was granted by the Laurel circuit court, restraining that town and T. J. Johnson, Jr., its tax collector, from collecting for the year 1918, an ad valorem tax in excess of \$0.50 on each \$100.00 worth of taxable property within its corporate limits. This appeal brings to us for review the judgment granting that relief.

The tax attempted to be collected by the town of London was \$0.75 on each \$100.00 worth of taxable property and was levied by and under an ordinance passed by its legislative body styling itself "common council," which claimed the right to fix the tax at that rate upon the ground that the municipality is a city of the fourth class, and hence empowered under the Constitution and laws of the state to levy a tax not exceeding that rate. It is, however, alleged in the petition that London is a town of the sixth class and by reason thereof without authority to levy a tax exceeding \$0.50 on each \$100.00 worth of taxable property within its corporate limits; and such was the conclusion of the circuit court. It is clear from what has been said that the question at issue is to be determined by whether London is a city of the fourth or sixth class.

Constitution, section 156, in providing for the classification of all municipalities in the state declares: "The cities and towns of this commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and, in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing, but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor. The general assembly, by a general law, shall pro-

vide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after the organization of said town or city."

It is clear from the language of the section of the Constitution, *supra*, that to the legislative department of the state government must be left the exclusive right to classify the cities and towns thereof and to change the assignment of a city or town from one class to another. In considering the extent to which this power may be exercised by the legislature, Cooley, in his work on Constitutional Limitations (4th Ed.), 225, says: "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished, and in the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act might be held equivalent to such finding."

The foregoing statement of the rule as announced by Judge Cooley has been followed in several cases decided by this court. *Griffin, Mayor, etc. v. Powell*, 143 Ky. 276; *Green, etc. v. the Commonwealth*, 95 Ky. 233; *Commonwealth v. Chinn, etc.*, 97 Ky. 730.

It is conceded by the parties to this appeal that by an act of the legislature, passed in 1914, the town of London was made a town or city of the fourth class; and to this class it must be held to still belong, unless it was by an act of the legislature, passed in the year 1916 (now sections 2740-2741 Ky. Stats.), made a town of the sixth class.

The act of 1916 referred to is entitled "An act to amend section 2740 and section 2741 of article 1, chapter 89, Ky. Stats., Carroll's revised edition 1915, relating to the classification of cities and towns." So much of the act as it is necessary to here set forth is as follows: "Be it enacted by the general assembly of the commonwealth of Kentucky that section 2740 of the Ky. Stats. (Carroll's revised edition 1915), entitled 'classification of cities and towns,' be amended by striking from the cities of the fourth class the words 'Ashland, Boyd county,' and by inserting the said words in the cities of the third class after the words 'Christian county,' so that when amended and re-enacted the said act shall read as follows." . . . The act then proceeds to indicate what cities and towns named in section 2740 are assigned to the first, second, third, fourth and fifth classes respectively, but does not name the town of London as one of those included in the fourth class: nor indeed is London named in the act by section 2741, which provides: "Sixth class—All other incorporated cities and towns not named in this bill shall belong to the sixth class." It would, therefore, seem to follow that as London is a town of the State not named among the municipalities assigned by the act to the first, second, third, fourth, or fifth class, it was intended to be and is included among all other unnamed towns placed by section 2741 in the sixth class. Two obvious changes are made in section 2740 by the act of 1916, viz.: (1) it takes the city of Ashland from the fourth class and puts it in the third class; (2) it omits from the fourth class, where it theretofore had been placed, the town of London, which omission by virtue of the provisions of section 2741 of the act necessarily put it in the sixth class with all other towns not specifically named in any of the previous classifications.

We do not accept the contention of appellants' counsel that specific mention by the act of the town of London and of its removal from the fourth class of municipalities was essential to such removal. The act relates to the classification of all cities and towns of the State, and the omission of the name of a city or town from every other class as effectually transfers or assigns it to the only class embracing the towns unassigned by name, as if it had expressly named the town and de-

clared its transfer from one to the other class. Section 2740 of the statute, *supra*, as amended by the act of 1916, is repugnant to its former provisions, and therefore, by implication repeals such of the former provisions as conflict with those of the act in its amended form.

The act of 1916 is in no sense violative of section 51, Constitution. The subject expressed in the title has relation to but one thing or matter, viz.: the classification of cities and towns; and as all of its provisions relating to this one subject, expressed in the title, are germane to and naturally connected therewith, it meets every requirement of section 51. *Burnsides v. Lincoln County Court*, 86 Ky. 423; *Mark v. Bloom*, 141 Ky. 474; *Commonwealth v. Starr*, 160 Ky. 260. Moreover, publication in full of the act, as amended, makes it specific enough as to the subject embraced by it, to show for what part of the former act it is substituted, and consequently, what part of the former act it repeals. *Commonwealth v. Reinecke Coal Mining Co.*, 117 Ky. 885.

If we are not mistaken in concluding that London is a town of the sixth class, the further conclusion that it was without power to levy the tax complained of by appellees inevitably follows; for section 3704, subsection 3, Ky. Stats., enacted to carry section 157, Constitution, into effect, declares that the tax rate of cities, towns, counties, taxing districts and other municipalities of less than 1,000 population, that is of the sixth class, for other than school purposes, shall not exceed \$0.50 on the \$100.00. The limitation as to indebtedness, found in section 157, Constitution, provides that, unless necessary to pay the interest on and create a sinking fund for the extinction of indebtedness contracted before the adoption of the present Constitution, "no county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding, in any year, the income or revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void."

As in this case the right of the town of London to levy a tax was limited to \$0.50 on each \$100.00 of property, in imposing a tax of \$0.75 on each \$100.00 of prop-

erty it exceeded its powers; hence, the action of the circuit court in enjoining the collection of the tax in excess of \$0.50 was not error.

Wherefore, the judgment granting the injunction is affirmed.

Sallie J. Thompson, et al. v. First National Bank's Receiver.

J. M. Thompson v. First National Bank's Receiver.

(Decided January 28, 1919.)

Appeals from Muhlenberg Circuit Court.

1. Judgment—Setting Aside Default Judgment.—The setting aside of a default judgment, at the same term, at which it is rendered, is a matter, within the judicial discretion of the court, and is not governed by the provisions of the Code, which relate to the granting of a new trial, after the term, at which the judgment was rendered, upon the grounds of casualty or misfortune.
2. Judgment—Setting Aside Default Judgment.—The principle which should guide the judicial discretion of the court, in setting aside a default judgment, at the term at which it was rendered, is the determination as to whether the ends of justice will be subserved, unless the laches of the applicant have been such as will in justice close the ear of the court.

HUBERT MERIDETH for appellants.

TAYLOR, EAVES & SPARKS for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing in each case.

These appeals, by agreement of the parties, have been ordered to be heard and determined, together. In the first styled action, John A. Best, as the receiver of the First National Bank, of London, Ky., recovered a judgment, by default, against the appellants, Sallie J. Thompson and J. M. Thompson, for the sum of \$1,500.00, with interest at 6% per annum, from September 5, 1913, and the further sum of \$2,750.00, with interest thereon at 6% per annum, from September 25, 1913, both of which sums, with their accrued interest, amounting, at the time, the judgment was rendered, to about \$5,259.00. The lia-

bility of appellants, it was alleged, in the petition, arose from the execution of two notes for the sums stated, to the First National Bank.

In the second styled action, the receiver of the First National Bank, recovered a judgment, by default, against the appellant, J. M. Thompson, upon a promissory note, which, it was alleged, he had executed to one Fitzgerald, who had transferred it to the bank, in the sum of \$750.00, with the accrued interest, at 6% per annum, from the 2nd day of May, 1914, amounting, principal and interest, at the time of the rendition of the judgment, to the sum of about \$900.00. Thus, the judgments, by default, in favor of the receiver, against J. M. Thompson, amounted to the sum of \$6,159.00, and that, in favor of the receiver, against Sallie J. Thompson, amounted to the sum of \$5,259.00. The petitions, in each of the actions, was filed on August 17, 1917, and the process served on August 23, 1917, which including the day of service, made the service of the process just ten days, before the first day of the Muhlenberg circuit court. When actions, at law, which were appearances, at that term, were called on the first day of the term, for the purpose of ascertaining, if there were defenses, J. M. Thompson was in the court room, but, whether under circumstances, that enabled him to hear the call of these cases, does not appear, and he states, in an affidavit, that he did not know of the rendition of the judgments, until several days thereafter, and just before the making of the affidavit. No one answering at the call of these cases, the judgments were rendered, for the amounts sued for. On the 12th day of September, thereafter, which was the ninth day of the term, the appellants entered motions to set aside each of the judgments, and with the motions, tendered their verified answers to the petitions. In the case against them, jointly, the appellants filed an answer, in which, Sallie J. Thompson denied, that she ever executed or delivered, either of the notes sued on, or authorized any one to execute or deliver them for her, and J. M. Thompson plead, that he had, long before the institution of the suit, paid and satisfied the notes to the bank. In the suit, against him, alone, J. M. Thompson, interposed a plea of payment of the note to the bank, before the institution of the suit. In support of the motions to set aside the judgments, the

appellants filed their affidavits. The statements in the affidavits of both appellants, was to the effect, that at the time, the summons was served upon them, they fully intended to defend the actions against them, but, that Sallie J. Thompson was then preparing to go to visit and assist her mother, who was a very aged woman, and at the time, very ill, at her home, in Laurel county, Ky.; that the appellants were husband and wife, and the wife relied upon the husband to attend to her business affairs, and that it was agreed, between them, that the husband would at once employ an attorney, at Greenville, where the courts of the county sat, to attend to the defense of the cases, for both, and relying upon this arrangement, the wife went to visit her mother, under the belief, that her defense would be interposed, at the proper time, and that she could return, when it would be necessary for her presence in court, and when she returned to her home on Saturday, the 10th day of September, she learned, for the first time, that a judgment had been rendered against her. The appellants resided, in Muhlenberg county, and J. M. Thompson deposed, that several days before the first day of the term of court, he communicated with the attorney, agreed upon, over the telephone, for the purpose of securing his services, for the defenses of the suits, but, that he was a party to several other suits, which were then being litigated, and in which the attorney represented him, and that he had a conference, of some considerable extent, with the attorney with regard to suits, in which he was engaged, and when it was done, he fully believed, that he had mentioned these actions to him, and had secured his services for their defense, and thereafter, remained under this delusion, until he received information, that the judgments, by default, had been rendered, when he was informed, by the attorney, that he had failed to make any arrangements, with him; that he was at Greenville on the first day of the term, to further consult with the attorney, but, on account of the attorney's engagements, could not get an opportunity to do so, except a hurried interview with him, at the adjournment of the court, at the noon hour, and did not have an opportunity to mention these cases, but, believing, that he had, previously, done so, he relied upon the attorney to take such steps as were necessary to make their defense. The statements made by appellants, in their affidavits, were uncontradicted. The court over-

ruled the motion to set aside the judgment and refused to permit the tendered answers, in each case to be filed. The defenses presented are, upon the faces of the answers, unquestionably, meritorious, and if true, it is impossible to conceive of how the ends of justice will be furthered, by requiring these appellants to pay the large sums, which they do not owe. Of course, a party can not engage in mere trifling with the courts, and then be heard to complain, that something has been done, in the course of administration of justice, which could not have occurred, but for his unqualified laches. It is difficult, however, to conclude, that a defendant, with a meritorious defense, would, knowingly, and purposely, neglect to interpose his defense, at the price of over six thousand dollars, for his pure neglect. The grounds for setting aside the judgments and permitting defense to be made, would be, unquestionably, insufficient and inadequate, if a party was seeking a new trial, upon the ground of casualty and misfortune, under the provisions of the Civil Code. The motions were, however, made and answers offered, at the same term, at which the judgments were rendered. The grounds presented, are somewhat exceptional, when the defenses offered, are considered. A different rule prevails, when a motion is seasonably made to set aside a default judgment, during the same term, at which it was rendered, from the rule, which prevails, when a new trial is sought after the term, at which it was rendered, on the grounds of casualty or misfortune or a new trial when both litigants have participated. In the instant case, before the motions were made to set aside the judgments, no other rights had arisen to intervene, and if the answers are true, the appellee had recovered judgments, amounting to \$6,159.00 to no part of which, was he justly entitled. In *Southern Ins. Co. v. Johnson*, 140 Ky. 486, this court, discussing the principles, which apply, when a motion is made to set aside a judgment, by default, at the same term, at which it was rendered, said: "The power of the court to set aside a default judgment at the term, at which it was rendered, is inherent, and not dependent on sections of the Code, regulating the granting of new trials. This power is not to be exercised capriciously or granted as a favor, or withheld as a rebuke for shortcoming in practice. It is exercised as a judicial discretion. It will not depend upon whether the party applying, can show

himself strictly entitled to the legal relief under Code provisions regulating the granting of new trials on grounds of casualty and misfortune. But, it will depend on whether the ends of justice will be furthered, and, in a measure, whether the party complaining, has been guilty of laches, such as to close the ear of the court to his application." As no other rights had arisen, between the rendition of the judgments and the motions, the delay causing no apparent inconvenience or loss of rights to the plaintiff, and it being more reasonable to conclude, that the laches arose from a cause other than purposeful neglect, the ends of justice will be better subserved by a trial upon the merits, than to allow a party to take from the others, a large sum of money, to which he is not entitled, and we, therefore, are of the opinion, that the court should have set aside the judgments and permitted the answers to be filed.

The contention, that the judgments were void, because, the plaintiff did not comply with section 120, Civil Code, by either filing the notes sued on with the petitions, or else set forth the reasons for the failure, is not tenable. If the defendants desire the notes to be filed, or reasons for the failure, they may secure a rule against the plaintiff, to file the notes, or show sufficient cause for the failure. The judgments are therefore reversed, and the causes remanded, for proceedings consistent with this opinion, but the circuit court, will not set aside the judgments appealed, from, until the appellants have paid all the costs, of the actions, both in the circuit court, and in this court, up to the filing of the mandates, in the circuit court, as under the circumstances, the relief granted, is upon that condition.

**Peoples Bank of Springfield v. Mrs. Winnie
Cocanaugher.**

(Decided January 28, 1919.)

Appeal from Washington Circuit Court.

1. **Exemptions—Specific Articles of Personalty.**—In the absence of a statute creating exemptions, all property is subject to execution, hence, the right of the debtor to an exemption must be determined by the statute creating the exemption; and when specific arti-

cles of personal property are made exempt by statute from sale for the payment of a debt or debts of the owner, the courts are not authorized, by construction, to extend the exemption to other articles or different property.

2. **Exemptions—Corn and Tobacco—Income Earned by Labor.**—Neither corn nor tobacco produced by the debtor or his family is "income earned by labor," within the meaning of section 1697, Ky. Statutes, and is not exempt from coercive sale for the payment of the latter's debts, except when the debtor has not provender on hand suitable for the maintenance of his family or live stock, as in such case the corn or tobacco, or a sufficiency of it for that purpose, may be exempted in lieu of the necessary provender not on hand.
3. **Exemptions—Income Earned by Labor.**—The "income earned by labor," contemplated by section 1697, Ky. Stats., is an income which can be measured in denominations of money, per month, the receipts being similar in character to such as are received from a salary or wages, although not necessarily payable at fixed times or in fixed amounts, but at the times and in the amounts the proceeds of labor may be received, as in the case of proceeds from the occupation of a mechanic and the like.

W. F. GRIGSBY and W. C. McCHORD for appellant.

H. W. RIVES and W. F. NEIKIRK for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Granting appeal; reversing.

This is an appeal from a judgment of the Washington circuit court whereby the appellee, Mrs. Winnie Cocanaugher, was awarded the proceeds of certain personal property, consisting of corn and tobacco, raised on the farm of her husband, W. R. Cocanaugher, and levied on under an execution for \$413.67 in favor of appellant issued upon a judgment recovered by it against the husband in the Washington circuit court. Appellee claimed and was adjudged the proceeds of the corn and tobacco upon the ground that it was exempt from execution under section 1697 Ky. Stats. She obtained an injunction preventing the sale of the corn and tobacco under the execution. It is admitted that there were seventy-three barrels of corn, fifteen barrels the proceeds of which were applied to the payment of taxes owing by appellee's husband, and thirty-eight barrels retained as bread stuff for the family for a year and provender for certain stock owned by appellee or her husband; leaving twenty barrels

which were sold for \$85.00. The tobacco was sold for \$875.00. Whether the setting apart to appellee and family of a part of the corn and sale of the remainder and the tobacco was done under an order of the court or by agreement of the parties does not appear; but the facts stated as to the disposition of the property and amounts realized are shown by the judgment of the circuit court, which also recites that of the \$960.00 thus realized for the corn and tobacco, \$810.00 was allowed appellee by the judgment as exempt property, leaving \$150.00 which was applied on the execution debt of the appellant bank.

Ky. Stats., section 1697, after declaring what articles of personal property, food stuff, provender for stock, etc., or their equivalent in other property, shall be exempt from execution, attachment, etc., to a person with a family, further exempts "ninety per cent of the salary, wages, or income earned by labor, of every person earning a salary, wages, or income of \$75.00 or less per month, provided that the lien created by service of garnishment, execution or attachment, shall only affect ten per centum of such salary, wages, or income earned at the time of service of process; of the salary, wages or income earned by labor, of every person earning a salary, wages or income in excess of \$75.00 per month, \$67.50 per month and no more shall be exempt; provided, that these amended exemptions shall only apply in actions brought upon contracts entered into after the effective date of this act, and no provision of this law shall be construed to make it retroactive in effect."

The exemption of money allowed appellee by the judgment of the court below was made under the provisions of the statute quoted, as if she were at the time of the levy of the execution earning wages, salary or income in excess of \$75.00 per month; the allowance being at the rate of \$67.50 per month for as much as a year.

Appellee admits that her husband owns or did, in the year the corn and tobacco levied on by appellant's execution were produced, own the land upon which they were grown; and the petition fails to allege her ownership of the corn and tobacco exclusive of her husband. Her only claim to the property, as alleged in the petition, is that she, her husband and seven children compose a family; that the husband is financially able to do little for the support of the family; that the corn and tobacco were

produced mainly by the labor of herself and children, and that the family, including the husband, herself and children, are entitled to the property in question or its proceeds, because it is needed for their support and is exempt from execution. There is no claim that she is earning wages or salary in the meaning of the statute, or that she is entitled to the property in lieu of such wages or salary. It is alleged, however, that the property constituted, practically, her only income. We regard it unnecessary to determine whether the petition, even if the truth of its allegations were admitted, shows such a right of action in appellee as would entitle her, instead of the husband, to recover the property in question. That question, therefore, is not decided. It is sufficient to say, however, that we are compelled to deny appellee the right of recovery asserted, for the reason that we have already decided the exemption provided by the statute cannot be claimed on the grounds urged by her. The case in which the question was raised and decided was that of *Roberts v. Frank Carruthers and Bros.*, 180 Ky. 315, in which the claim was made that a crop of tobacco attached was exempt to the debtor under section 1697, Ky. Stats., because it was the sum total of his wages and income for the year 1916, earned by his labor; that it amounted to less than \$75.00 per month; and that ninety per centum of the tobacco or its value, was exempt from the attachment and only ten per centum thereof, or its value, was subject to the attachment. The opinion rejected each of these contentions, holding: (1) that a crop of tobacco is not "income earned by labor," within the meaning of section 1697, Ky. Stats., and is not exempt from coercive sale for the payment of the owner's debts, except when the debtor has not provender on hand suitable for the maintenance of his live stock, in which event the tobacco or a sufficiency for that purpose, may be exempted in lieu of the necessary provender not on hand; (2) that the "income earned by labor," contemplated by section 1697, Ky. Stats., is an income, which can be measured in denominations of money, per month, the receipts being similar in character to that received from salary or wages, although not necessarily payable at fixed times or in fixed amounts, but at the times and in the amounts the proceeds of labor may be received, as in the case of proceeds from the occupation of a mechanic may arise,

and such like. Corn or other crops are no more exempt on the grounds urged by appellee than tobacco. Manifestly, the opinion in the case, *supra*, is conclusive of the instant case. Wherefore the appeal prayed is granted, the judgment reversed and cause remanded for such further proceedings as may be consistent with this opinion.

Riddell, et al. v. Boone County, et al.

(Decided January 28, 1919.)

Appeal from Boone Circuit Court.

1. Counties—Fiscal Courts—Records.—A fiscal court can speak or contract only through its records properly made.
2. Counties—Fiscal Courts—Road Bonds.—After road bonds have been issued and sold upon a 4 per cent interest basis, the fiscal court is without authority to exchange new 5 per cent bonds for the old issue of 4 per cent bonds and thus increase the interest rate, without consideration.
3. Counties—Fiscal Courts—Contract to Sell Road Bonds.—The mere fact that the members of the fiscal court verbally directed salesmen to tell prospective bond purchasers that the 4 per cent bonds might be exchanged for 5 per cent bonds if the county later decided to issue 5 per cent bonds, was ineffectual to confer authority upon the salesmen to make such contract, in the absence of a properly entered order of the fiscal court.

N. E. RIDDELL for appellants.

P. E. CARSON for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

In 1916 Boone county voted a bond issue of \$200,000 for the construction and reconstruction of its roads and bridges. The bonds were directed to be issued in denominations of \$500.00 each, and to draw 4% interest from their date, payable semi-annually on the first day of July and January of each year. The fiscal court authorized a sale of the bonds serially, and bonds number 1 to and including bond number 187, were sold for par, accrued interest and a small premium. Thereafter, and on April 2, 1918, the fiscal court having discovered that the whole bond issue of \$200,000.00 could not be sold upon

a four per cent (4%) interest basis, as was authorized, the court entered the following order:

"Since the \$200,000.00 of the county road bonds were to draw 4% interest, the court found immediately thereafter that the bonds could not be sold at par for the time same were to become due and the court authorized the sale of said bonds with the understanding that if the rate of interest should be increased at any time the owners of the bonds that had been issued heretofore, could by the holders thereof be exchanged for the bonds drawing the greater rate of interest and the court hereby authorized and directs that the said bonds be reissued drawing 5% interest from July 1st, 1918, and that the holders of the present issue be permitted to exchange the 4% bonds owned by them for the 5% bonds of the new issue and that the remainder of the said bonds be sold as the court may direct and the committee heretofore appointed will not sell any of said bonds of the first issue, except enough to pay the claims against the bond fund and these bonds to be sold at par and accrued interest and the purchasers to have the right to exchange those bonds for those of the new issue. The new issue to be in denominations of \$500.00, numbered and due as follows, with interest payable semi-annually:"

(Bond numbers, when due and the amount.)

At the time this order was entered \$93,500.00 worth of bonds had been sold and delivered and were then held by the purchasers. To enjoin the county and fiscal court from exchanging the 5% bonds for the old 4% bonds held by the purchasers, the county attorney, Riddell, as a taxpayer and in his official capacity, instituted this action in the Boone circuit court, setting forth all the facts, including a history of the proceedings in the fiscal court, and copies of the orders made by that court, and prayed an injunction restraining the county and the court from making the exchange of the bonds. A general demurrer was filed to the petition and sustained by the court, and the petition was dismissed. The county attorney prosecutes this appeal.

The only question presented is: Did the county, through its fiscal court, have authority and legal power to order an exchange of the 5% bonds for the outstanding 4% bonds? Could the fiscal court, without consideration, change the contract between the county and the

bond holders by increasing the rate of interest upon the bonds? The fiscal court, like municipalities, can speak only through its records. It is a court of limited jurisdiction or powers and is confined to the authority conferred upon it by the statutes. It can not contract except by its records made in the way provided by law, and extraneous evidence is not admissible to show the purpose or meaning of its orders. *Worrell Mfg. Co. v. City of Ashland*, 159 Ky. 656; *City of Louisville v. Parsons*, 150 Ky. 420; *Creekmore v. Central Construction Co.*, 157 Ky. 336; *Montgomery County v. Taylor, et al.*, 142 Ky. 547; *Fiscal Court v. Board of Trustees*, 118 S. W. 298; *McDonald's Admr. v. Franklin County*, 125 Ky. 205. While it is alleged in the petition that the 4% bonds were sold with the understanding and agreement with the purchasers that such bonds might be exchanged for a higher rate of interest bearing bonds, if the county should later determine to issue bonds bearing interest at a higher rate, there was nothing in the order of the court authorizing or directing the bonds to issue or to be sold, which indicated such an agreement, or gave the salesmen authority to make such representation or agreement with purchasers. In the absence of such an order or judgment of the court, the salesmen were without authority or power to make such agreement for and on behalf of the county or fiscal court, even though the members of the fiscal court verbally directed or sanctioned such agreement. It was incumbent upon the purchasers of the bonds to look to the orders of the fiscal court, and no mere verbal agreement, or agreement beyond the scope of the authority granted by the orders of the fiscal court, were binding. *Woodruff v. Shea*, 152 Ky. 657; *American Car and Foundry Co. v. Johnson County*, 147 Ky. 69; *Miles Auto Co. v. Dorsey*, 163 Ky. 692; *Worrell Mfg. Co. v. City of Ashland*, *supra*; *City of Louisville v. Parsons*, *supra*; *Creekmore v. Central Construction Co.*, *supra*; *Montgomery County v. Taylor*, *supra*; *Fiscal Court v. Board of Trustees*, *supra*; *McDonald's Admr. v. Franklin County*, *supra*. The purchasers, therefore, took the bonds with constructive notice that the interest rate was then and would continue to be as expressed in the face of the bonds, four (4%) per cent. The salesmen were without authority to vary or change the contract with respect to the rate of interest; and the fiscal court is likewise without power, now that the bonds

are sold, delivered and held by the purchasers, to vary the contract by increasing or reducing the rate of interest. The fiscal court is an agency of the county and its taxpayers, and as such agency it is exceeding its authority when it attempts to appropriate public funds in a way not authorized by statute, or to donate the same. To allow the fiscal court to change the rate of interest on the bonds would be investing it with power and authority to make gifts or donations from the public funds, for that would be the effect of increasing the interest rate from 4% to 5%, a difference of 25%, which, upon the bonds already issued and sold, would amount to more than \$900.00 per year in interest.

The petition stated a cause of action, and the general demurrer should have been overruled and the relief prayed, in the absence of a showing by defendants, granted.

Judgment reversed for proceedings in conformity to this opinion.

Tobien, et al. v. Gentry.

(Decided January 28, 1919.)

Appeal from Warren Circuit Court.

1. **Deeds—Constructive Notice.**—A recital in a deed of record that the grantor is selling only a homestead in the lands, is constructive notice to all subsequent purchasers, and precludes their claiming the fee simple title as innocent purchasers.
2. **Marriage—Marriage of Slaves—Legitimacy.**—Society as well as the statutory law of this state recognized the validity of customary marriages among slaves before the civil war, and where a colored man and woman, by the custom of times, were recognized as husband and wife; lived as such, and raised a family, the issue of the marriage will be regarded as legitimate and entitled to inherit from their ancestors, even though no certain or specific form of marriage ceremony was performed and no witness testifies to having witnessed the ceremony.
3. **Homestead—Abandonment of by Widow—Deeds.**—A widow who sells and attempts to convey her homestead right in the lands of her deceased husband, abandons the same and her grantor takes nothing by the deed.
4. **Homestead—Innocent Purchaser.**—One is not an innocent purchaser of land for value who knows the fact that there are un-

known heirs, or who is confronted by a deed in his chain of title specifically reciting that the widow's homestead right alone is conveyed.

RODES & WALLACE and GEORGE H. GALLOWAY for appellants.

SIMS, RODES & SIMS for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

An old colored man named Hart Covington died intestate, domiciled in Warren county, in 1910, the owner of a tract of about fourteen acres of land, which he occupied as a homestead. He had been married three times. He was married the first time before the breaking out of the Civil War, and, of course, was a slave. According to the custom of the times he belonged to a master named Ben Covington, a prominent citizen of Warren county, and Hart bears the family name of his master. Before Covington purchased Hart he belonged to another master in the State of Tennessee; so also did his wife, Sallie.

When Covington acquired the two negroes he kept them together with their little family for a few years, and then sold Sallie and retained Hart. To this slave marriage were born three children, among them a girl named Martha, who is the mother of Ida Tobien, plaintiff in this action. All the children of Hart Covington are dead, and the plaintiff, Ida, is his only lineal descendant. After the death of Hart Covington a suit was instituted by his widow, Julia, in the Warren circuit court, against Rebecca Shields, a creditor, and the unknown heirs of Hart Covington, to settle the estate of Hart Covington. In that action it was alleged that Rebecca Shields held a mortgage for \$300.00 on the little tract of land left by Hart, and that certain other debts were owing by the estate. This allegation was also made: "Plaintiff states that the said decedent (Hart Covington) left surviving him as his only heir at law, the plaintiff, Julia Covington, his widow, and that she is informed and believes there are unknown heirs of the said Hart Covington by a former and slave marriage." A warning order was entered, warning the unknown heirs of Hart Covington to answer the petition in thirty days, and Byron Renfrew, a regular practicing attorney, was appointed to inform the unknown heirs of the nature and pendency of the action.

By his report it is shown, "I have tried diligently to ascertain both their names and places of abode (of the unknown heirs), and that after an examination of the papers I am unable to make any affirmative defense." The cause was referred to the master commissioner to receive and report claims against the estate. As no answer was filed, a judgment was entered subjecting the property to the mortgage lien and other debts, and allotting homestead from the remainder to the widow. By report of sale the master commissioner stated that the property was appraised at \$1,000.00; that Claude Thomas purchased 7 11/12 acres for \$490.75, which was enough to pay the debts and cost; that there remains 6 1/4 acres of land. This 6 1/4 acres was assigned to the widow as homestead, and shortly thereafter, and on the 27th of April, 1911, the widow, Julia Covington, executed to Claude Thomas a deed for her homestead in the lands in consideration of \$300.00 cash in hand paid. The deed recites "the party of the first part has bargained and sold, and does by these presents bargain, sell, transfer and convey unto the party of the second part, his heirs and assigns, all her right, title and interest of whatsoever nature it may be." In concluding the description in the deed, this provision is inserted: "The same being that part of the Hart Covington lands set apart to party of the first part as the widow of said Hart Covington, as a homestead, by judgment of the Warren circuit court, and for more particular reference is made to the papers in suit No. 7138, Julia Covington, Admrx. v. Rebecca Shields, in the Warren circuit clerk's office." This deed was recorded on May 1, 1911, in the proper office. Shortly thereafter Thomas sold the entire Hart Covington tract, including that which he had purchased at the master commissioner's sale, and the homestead which he had purchased from the widow, and it was again and again transferred until it reached the appellee, Noel Gentry, who now holds and claims it. It will be observed that the appellant, Ida Tobien, was not a party to the action brought by the widow to settle the estate of Hart Covington, although she resided in the city of Bowling Green at the time the action was instituted and brought to trial. The chancellor dismissed the petition of Ida and she prosecutes this appeal.

The evidence establishes beyond question that Ida is the granddaughter and only living descendant of Hart

Covington. She is therefore entitled to the property in controversy, unless (1) she has forfeited her right, as contended by appellees, by her laches, or in failing to join in the action to settle the estate of Hart Covington and assert her right as heir; or, (2) has been guilty of such conduct as would constitute an equitable estoppel against her. Neither of these things appears to be true. Appellee insists that as he and his predecessors in title purchased the land in good faith, believing Aunt Julia to be the owner in fee thereof, appellee is entitled to protection, especially in view of the fact that section 1399a Kentucky Statutes provides that where the property of a colored father or mother has passed to innocent purchasers, or has been divided out and sold, or distributed by order or judgment of a court of competent jurisdiction, the heirs of a slave marriage shall not be entitled to recover the same. This contention is not well founded for the reason that Thomas, the purchaser from the widow, was also the purchaser of a part of the land at the commissioner's sale and was, therefore, acquainted with all the facts, and the further fact that the deed from Aunt Julia to Thomas specifically recites that she was selling to him only a homestead right, and as this deed was of record the subsequent holders and claimants are concluded by its terms and are in no better position than was their grantor, Thomas, because they had constructive notice of the fact that Aunt Julia conveyed only her homestead right. The delay in bringing this action by Ida is not so great as to have misled, deceived or injured the appellee in his rights under the facts of this case. The widow was entitled to occupy the homestead so long as she lived, but when she undertook to convey it she abandoned it and the remainderman was entitled to immediate possession. *Jones v. Green*, 26 R. 1191; *Bryant v. Bennett*, 22 R. 1866; *Kimberlin v. Isaacs, et al.*, 23 R. 42; *Freeman v. Mills*, 101 Ky. 142; *Clay v. Wallace*, 116 Ky. 599; *Block v. Tarrent*, 28 R. 1067; *Phillips v. Williams*, 130 Ky. 779; *Overby, et al. v. Williams*, 170 Ky. 140; *Love v. McCandless*, 157 Ky. 353; *Jackson v. Claypool*, 179 Ky. 662.

The chief insistence of appellee is that the evidence fails to show that Martha, the mother of Ida, was begotten and born to Hart and Sallie during the existence of the marriage relation between the slaves. All the evi-

dence in the case conduces to prove that Hart and Sallie were married in Tennessee according to slave custom, and had lived together there as man and wife for some years before they came to Kentucky. Some of the witnesses say that Martha was born in Tennessee before her father and mother were purchased by Covington; while others say that Martha was born in Kentucky, at the Covington home. However this may be, all the evidence tends to prove that Martha was an issue of the slave marriage between Hart and Sallie. There is no evidence to the contrary, and several old colored people acquainted with Hart Covington and his wife, Sallie, gave evidence concerning their married relation existing at the time of Martha's birth. So long as Sallie lived Hart acknowledged her as his wife. Even after Sallie was sold by Covington to Smith, Hart continued to live with her as his wife and to claim her as such and, as was the custom among negroes, went to her house each Saturday night to visit his wife. That was one of the privileges of a negro slave. While he was not allowed to remain with his wife through the entire week, it was his right, according to custom acknowledged among both white and black, to visit her each Saturday night. Hart always acknowledged Martha as his child. From this evidence we are fully persuaded that Martha was the issue of a customary marriage between Hart and Sallie.

The judgment is, therefore, reversed with directions to enter a judgment in conformity with this opinion.

Raydure v. Board of Supervisors, Estill County.

(Decided January 31, 1919.)

Appeal from Estill Circuit Court.

1. **Taxation—Discrimination Between Non-resident and Resident Owners Not Allowable.**—The legislature has no power to subject to taxation the property of non-residents in this state if like property owned by residents is exempt from taxation.
2. **Taxation—Of Mineral Rights and Leases of Non-residents.**—The fact that the legislature provides a different method of ascertaining the value and character of property owned by non-residents in this state in order that it may be assessed, from that provided for the assessment of like property of residents is not discrimination.

3. **Taxation—Schedule of Property Subject to Assessment—Assessment of Property Not Mentioned in.**—Although assessable property of a particular description may not be mentioned in the tax schedule it is subject to assessment and taxation under section 4020 of Kentucky Statutes and the item in the schedule providing for the assessment of the value of "property not mentioned in the schedule."
4. **Taxation—Oil Leases.**—Oil leases giving the lessee the exclusive privilege for a specified time of exploring for and producing oil on the leased premises is property that may be assessed for taxation.
5. **Taxation—Definition of Word "Property."**—In its broad sense the word "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises and hereditaments that a person owns.
6. **Taxation—Definition of Property That Has Assessable Value and May Be Taxed.**—Under our Constitution all property that has a cash value in any amount and that may be the subject of barter and sale is subject to assessment and taxation. The test is—Has it a cash value in some amount and if offered for sale could any bidder be found that would pay a cash price for it in any sum?
7. **Taxation—Ascertainment of Fact Whether Property is Subject to Assessment.**—A dispute between the taxpayer and assessing authorities as to whether certain property has any assessable value is a question of fact that must be determined as are other disputed issues of fact.
8. **Taxation—Oil Leases.**—Oil leases if they have any cash value are subject to assessment although there may be producing wells on the territory covered by the leases on which a production tax on the oil produced is paid by the owner of the lease.
9. **Taxation—Oil Leases—Oil Production Tax.**—Legislature may fix a production tax on the value of oil produced but it must not be an unreasonable or arbitrary tax.
10. **Taxation—Oil Leases—Production Tax on Oil is a License Tax.**—The act providing for an oil production tax is a license tax on the business of producing oil and is authorized by section 181 of the Constitution.
11. **Taxation—License Tax—Property Tax.**—In addition to the ad valorem property tax authorized by section 171 of the Constitution a license tax may be imposed on any trade, occupation or profession.
12. **Taxation—License Tax—Character of Tax That May Be Levied.**—A license tax may be regulated on an ad valorem basis on the volume of business done or it may be a fixed sum levied for carrying on the business.
13. **Taxation—Property Tax Authorized by Section 171 of the Constitution Must be Uniform.**—Section 171 of the Constitution as amended only provides for a property or ad valorem tax and this tax must be uniform upon all the property subject to the tax.

14. **Taxation Classification of Property—Uniform Property Tax.**—If property is classified under section 171 of the Constitution only a uniform property tax can be levied on the property embraced in the class.
15. **Taxation—License Tax Cannot Be Substituted for Property Tax.**—A license tax for engaging in a business, trade or profession cannot be imposed in lieu of a property tax but it may be imposed in addition to the property tax.
16. **Taxation—Oil Leases—Assessment of for Taxation.**—Where the same person owns several oil leases each should be assessed for taxation separately from the others.
17. **Taxation—Oil Leases—Exemption of Producing Wells.**—In ascertaining the value of an oil lease for taxation the value of producing wells on the premises should be excluded.
18. **Taxation—Assessment of Oil Leases—Exemption of Producing Wells.**—Whether it is allowable in fixing the value of an oil lease to exempt in connection with the well five acres of land adjoining or any number of acres is a question not decided.

EDWARD C. O'REAR, B. B. JOUETT, J. C. JONES, PENDLETON & BUSH and J. T. METCALF for appellant.

CHARLES H. MORRIS, Attorney General, M. M. LOGAN, R. V. GARRED, CLARENCE MILLER and JOHN T. WALKER for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Reversing.

A number of legal questions are presented in this appeal, which comes up from a judgment of the Estill circuit court assessing for taxation certain oil leases owned by the appellant, Raydure.

The case was first appealed by Raydure from the decision of the board of supervisors of Estill county, to the quarterly court of the county, and from that court to the circuit court. In the quarterly court the record consisted of an agreed statement of facts and on this agreed statement the case was heard and disposed of in the quarterly court as well as the circuit court. This statement sets out that "the following is stated and adjudged to be the facts and all of the facts relevant to this appeal, and shall be treated and considered as the evidence and all of the evidence introduced and heard upon this appeal the same as if taken by the testimony of witnesses introduced in open court.

"The appellant, W. S. Raydure, is a resident of the state of Ohio, and a non-resident of Kentucky, and of Estill county, and at the time of assessment made by

the board of supervisors of Estill county, Kentucky, appeared before said board and under oath listed and gave in for assessment the following property, to-wit: Oil and gas leases covering twelve hundred and seventy-two (1272) acres of land in Estill county, made up as follows:

1. Tilford McIntosh lease of 100 acres, upon which have been drilled 12 producing wells.

2. Maple lease of 173 acres, upon which have been drilled 33 producing wells.

3. T. B. McIntosh lease of 300 acres, upon which have been drilled 15 producing wells.

4. Ed Ginter lease of 55 acres, upon which 1 producing well was drilled and one dry hole.

5. Berry Abner lease of 100 acres, upon which have been drilled 7 producing wells and 1 dry hole.

6. W. J. Crow lease of 40 acres, upon which have been drilled 12 producing wells.

7. John Puckett lease of 200 acres, upon which have been drilled 7 producing wells and 2 dry holes.

8. Charles Tipton lease of 105 acres, upon which have been drilled 24 producing wells.

Making a total of 1272 acres.

"The said appellant, Raydure, did not list these oil or gas leases voluntarily but under protest, contending that under the law he was not required to list undeveloped territory.

"He also testified before said board that from his experience and in his judgment all of said leases were fully developed and that he would not develop any of said leases any further, believing that there was no oil under the undrilled portions of same, but it is agreed that it is unknown and cannot be certainly ascertained whether there is any oil under said undeveloped portions of said lands until the same is actually drilled. But the board of supervisors was of the opinion that said undeveloped portion of said leases were very valuable. The appellee, board of supervisors, without hearing further testimony, fixed the assessment upon said property as a whole at the total sum of approximately two hundred and fifty thousand dollars (\$250,000.00) on said leases. All of said leases were oil leases and said productions were of oil.

"It further appeared from the testimony of said Raydure that all of said wells were being operated and that the oil was being pumped and transported from said wells and in the process of marketing and same was subject to the direct tax fixed by the laws of Kentucky under the act of the special session of the Kentucky legislature of 1917, being chapter 9, and as amended by chapter 122 of the Acts of 1918.

"The appellee, board of supervisors allowed only five (5) acres of land to each well on the above leases and exempted said five (5) acres from taxation as connected with said wells and made the above assessment of two hundred and fifty thousand dollars (\$250,000.00) on all of the above described acreage in excess of five (5) acres allowed for each well.

"And it is agreed that the leases referred to gave to said Raydure the right to enter upon said lands for the purpose of drilling for oil and gas, and if found to remove and market same, and said leases were for the term of five (5) years or so long thereafter as oil or gas is found and produced therefrom in paying quantities, the lessor to be given one-eighth ($\frac{1}{8}$) of the oil produced therefrom, free of cost, delivered in the pipe lines for market."

It appears from this statement of fact that Raydure is a non-resident of Kentucky and it is one of the contentions of his counsel that the legislature discriminated against non-resident leaseholders of oil leases, and in favor of the resident leaseholders of such leases, by making provision for the assessment and taxation of oil leases held by non-resident owners, without making any provision for the assessment or taxation of such leases when held by a resident owner. Or in other words that the legislature attempted, in the legislation presently to be noticed, to assess for taxation all oil leases held and owned by non-residents, while exempting from taxation such leases when held and owned by residents of the state. And if this contention is well founded there can be no doubt that the legislation under which this discrimination was sought to be worked was unlawful, because the legislature of the state has no power to thus discriminate between non-resident and resident holders and owners of oil leases.

The same species or class of property wherever it be situated in this state and whether it be owned by res-

idents or non-residents of the state must be subjected to the same rate of taxation. Neither the state nor local taxing authorities have any discretion to exercise in respect to the assessment and taxation of the same species or class of property. If the property of a resident owner is exempt from assessment and taxation like property owned by the non-resident must also be exempt. This principle of uniformity and equality is so clearly declared in section 171 of the Constitution as amended that further citation of authority would seem unnecessary. This section in part provides that taxes "shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax." Hager, State Auditor v. Walker, 128 Ky. 1.

The legislation under which the oil leases of Raydure were assessed was enacted in 1918 and may be found in section 4039, volume 3, of the Kentucky Statutes. It reads in part as follows: "It shall be the duty of all persons owning any real or other property, mineral rights, or standing trees of any kind whatever on the lands of another, or any coal, oil or gas privileges by lease or otherwise, or any interest therein, in this state, other than in the county in which the said owner resides, or if said owner should reside out of the state, to list the property for taxes personally, or by an authorized agent in the county where situated at the same time and in the same manner as is now required by law of resident owners; or to file a descriptive list of the same between the first day of July and the first day of October in each year with the county clerk of the county wherein said property is located, fixing a fair cash value of the same and giving the nearest resident thereto and the number of the magisterial district in which the same is located." This statute, substantially as it is now, was first enacted in 1894 (see 1894 edition of Kentucky Statutes, section 4039), and has been carried as a part of the statute law of the state since.

In its beginning the legislation provided for the filing by the non-resident owner with the clerk of the county court of the county in which the property was situated of a descriptive list, and the purpose of the legislation then and now was to identify the owner of property and secure its assessment when he happened to be a

non-resident of the county in which it was situated, so that the assessing authorities might be able to list in the name of the owner the property, which it would often be difficult to do if the owner did not reside in the county where the property was located. *Com. v. Holliday*, 98 Ky. 617.

When the property was so listed it could only be subjected to the same rate of taxation imposed on like property owned by resident owners.

Accordingly we think no objection can be found to the legislation merely because it provided a different method for listing for taxation the property of non-resident owners from that provided for the listing of the property of resident owners.

Let us see now if there is or was at the time this case originated any statutory provision for the assessment and taxation of oil or gas leases held and owned by residents of the state or by persons who resided in the county where the lease sought to be taxed had a situs. Going back again to the Kentucky Statutes of 1894, which was the first edition issued following the adoption of the Constitution, and in which the provisions heretofore referred to prescribing the methods of listing for assessment the property, including coal, oil, or gas privileges or leases of non-residents are found, there is a schedule which contains a large number of items of property that should be listed for taxation but neither in it nor subsequent statutes was there any specific item calling for the listing for assessment of "mineral rights, trees, coal, oil or gas privileges or leases;" but there was and is a clause following the items specified, providing for the listing of the "value of all property not mentioned above," and plainly this blanket clause was intended to cover and embrace every species of property not specifically described in the itemized list of property the taxpayer should be inquired of concerning. The legislature evidently knew that there might be other species of property than that particularly set forth in the items, as it would be almost impossible to accurately describe in a schedule every species of property that a taxpayer might own; and so, as we have said, to cover any omissions in the items scheduled, the general clause was inserted.

We also think it too plain for difference of opinion that if the assessing authorities should discover that a taxpayer owned any species of property not specifically described in the schedule that it would be their duty to list it for taxation. For example, if a resident owned a gasoline engine of the cash value of one thousand dollars or standing branded trees of the value of \$5,000.00, we take it for granted that no one would contend that this personal property should not be assessed for taxation merely because gasoline engines or standing branded trees were not mentioned in the schedule.

If the rule of construction should obtain that the taxing authorities were limited to the items of property specifically mentioned in the schedule much valuable property clearly subject to assessment might not be assessed because omitted in the schedule although it could not be insisted that the legislature intended to exempt it from taxation.

In short, we have no doubt that section 172 of the Constitution providing that "all property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, . . ." and section 4020 of the Kentucky Statutes, enacted in pursuance thereof, providing that "all real and personal estate within this state, . . . shall be subject to taxation unless the same be exempt from taxation by the Constitution, . . .," confer on the taxing authorities ample power to assess for taxation every character and species of property not exempt that may be found in the state, although it may not be specifically mentioned in the schedule prepared for the guidance of the assessor and taxpayer. Nor do we think it necessary that there should be any other provisions of the statute than the one mentioned conferring this authority, although if express statutory direction were necessary it may be found in that item of the schedule providing for the assessment of the "value of all property not mentioned" in the schedule.

We may therefore pass without further comment the argument that the statute requiring non-residents to list certain species of property is discriminatory because there is no provision authorizing the assessment of like property owned by residents, as there can be under the statute no discrimination of the nature mentioned.

Another contention earnestly pressed on our attention is that a lease granting the privilege of drilling for and producing oil if it can be found on the leased premises is not "property" within the meaning of the word "property," as found in section 172 of the Constitution, until after wells have been drilled and oil has been found on the leased premises. If this position is well taken it would necessarily follow that an oil lease merely giving the lessee the right to explore for oil on the premises leased would not be assessable for taxation until after explorations had been made and oil located and produced.

We do not, however, find ourselves able to agree with counsel in this argument and will endeavor to state the reasons why. We find in the agreed facts that the leases assessed gave Raydure "the right to enter upon said land for the purpose of drilling for oil and gas and if found to remove and market same, and said leases were for the term of five years, or so long thereafter as oil or gas is found and produced therefrom in paying quantities." It is further conceded that these leases gave to Raydure the exclusive privilege of drilling for oil and gas on the property described in the leases. Now, were these leases property subject to assessment and taxation?

Turning again to section 172 of the Constitution we find that "all property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

In defining the word "property" in its constitutional sense this court, in *Commonwealth v. Kentucky Distilleries and Warehouse Company*, 143 Ky. 314, quoted with approval from Bouvier's Law Dictionary the following: "The term 'property' embraces every species of valuable right and interest, including real and personal property, easements, franchises and hereditaments." And also the following from an article in 32 Cyc. 648, prepared by the Hon. Shackelford Miller, late of this court, the following: "The term 'property' is a generic term of extensive application; and while strictly speaking, it means only the right which a person has in relation to something, or that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, it is

frequently used to denote the subject of the property or thing itself, which is owned or in relation to which the right of property exists. In the former sense it extends to every species of valuable right or interest, in either real or personal property, or in easements, franchises, and incorporeal hereditaments, and in the latter to everything which is the subject of ownership, or to which the right of property may legally attach, or in other words every class of acquisitions which a man can own or have an interest in. The term is therefore said to include everything which is the subject of ownership, corporeal in incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession, everything which has an exchangeable value, or which goes to make up one's wealth or estate."

It will be seen from these definitions, which are abundantly supported by authority, that the word "property" is one of the very largest meaning, and in its use in taxing statutes, unless limited by the words of the statute, it covers and embraces everything which is the subject of ownership and has an exchangeable value. But under our constitutional and statutory provisions the word "property" may be said to only embrace that character or species of property that has a cash value and may be the subject of barter or sale, but if it is of this class or character it cannot escape taxation. It must, however, be property that has a fair cash value, whatever that cash value may be. If it has no cash value whatever it is not subject to assessment and taxation although it might in a broad sense of the word be something that would fall within the description of property.

And so we think that in determining whether an article or thing is the subject of taxation the constitutional test is—Has it a cash value in some amount? If offered for sale could any bidder be found who would pay a cash price for it in any amount? If so it is subject to assessment. As a general rule there are few articles or things that may be the subject of barter or sale that have not some cash value although it may be but trifling. It may also be true that there are a few articles or things that in a very limited way may be the subject of barter or sale that have no cash value; but articles or things of this character are so rare as to be a negligible quantity in determining what is included in the word "property" as found in taxing provisions.

In view of this it would serve no useful purpose to extend this opinion in undertaking to ascertain or describe the few articles or things that might be the subject of barter or sale but that yet have no cash value.

From what has been said it follows that if it should be made to appear by satisfactory evidence that an oil lease granting the exclusive privilege to go upon premises for a definite period of time and explore for oil had no cash value and would not bring anything at a fair voluntary sale, then such a lease would not, of course, be subject to assessment for the simple reason that it had no assessable value. If, on the other hand, such a lease has a cash value in some amount, and this value can be ascertained by offering it for sale, then it should be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale. This is a question of fact more than law. If the lessee says his oil lease has no value and would not bring anything at a fair voluntary sale, and the assessing authorities say it has a cash value and will bring something at a fair voluntary sale, this disputed issue of fact must be determined as are other disputed issues of fact.

We are unable to perceive any sound reason why an oil lease that may be a subject of barter and sale should not be taxed if it has a cash value and will bring something at a fair voluntary sale. Indeed it would be a deliberate and flagrant violation of the Constitution to hold that an oil lease having a cash value and that could be sold on the open market for cash in some amount at a fair voluntary sale was not assessable property.

Nor is the question an open one in this state. It was before us in *Wolf County v. Beckett*, 127 Ky. 252. In that case the question was whether certain oil leases held by Beckett and others were subject to assessment. In the circuit court they filed a petition setting out that they held the oil and gas wells by leases but they had no title to the realty covered by the respective leases; that the leases simply gave them a license or privilege to go upon the land and drill and explore for oil and that the oil under the land covered by the leases was realty until severed from the soil, and was not properly assessable against them. The lower court in sustaining this contention held that oil in the ground was a part of the realty and belonged to the owner of the surface until it was

taken from the ground, or until the owner made an absolute deed to the oil under the surface, thus separating it from the realty; and that a lease for a term of years was not such an interest in real estate as required the lessee to pay the taxes on the leased premises.

This court, in reversing the judgment of the lower court, said: "It is contended, however, that property held under lease is not subject to taxation in the hands of the lessee. As a general proposition this is true, but there is a wide difference between an ordinary lease of lands and an oil or gas lease. Under the former, the lessee has only the right to occupy and cultivate the land, and take therefrom the growing crops. At the expiration of his lease, the property is intact. Its condition is substantially the same as it was when he entered upon the land. The property owned by the lessor is not diminished. Its value is practically the same. This is not true, however, of an oil or gas lease. The latter carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. The title to the oil or gas is vested by the lease in the lessee. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property which has substantial value and is the subject of frequent sale." To the same effect is *Mt. Sterling Oil and Gas Co. v. Ratliff, Sheriff*, 127 Ky. 1.

We find no reason for departing from or modifying the rule announced in this case and therefore hold that an oil lease covering undeveloped territory and that has any cash value for which it could be sold at a fair voluntary sale, may be the subject of assessment and taxation.

But it is further insisted that the oil leases here in question should not be assessed even if they have a cash value and could be sold for cash at a fair voluntary sale because, as said, the oil production tax provided for in section 1 of an act of 1917 that may be found in section 4223c of volume 3, Kentucky Statutes, was intended to and does include the value of the lease on the property from which the oil is produced. This act reads: "Every person, firm, corporation or association producing crude petroleum oil in this state shall, in lieu of all other taxes

on the wells producing said crude petroleum, annually pay a tax equal to 1 per centum of the market value of all crude petroleum so produced, and such tax shall be for state purposes, and, in addition, any county in the state may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of one per centum of the market value of all crude petroleum produced in such county, and the fiscal court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected, and, when crude petroleum is produced in any separate taxing district in a county, the fiscal court shall equitably distribute such taxes between the county and such taxing district."

In other words, the argument rested on this statute is that when a producing well is found by the lessee of an oil lease the tax on the oil produced from the well exempts from further or other taxation the lease not only on the particular premises that may be said to be included in the well but the remainder of the lease, and of course if this argument is sound the leases here sought to be and that were taxed in the lower court are wholly exempt from taxation although they might have a large value on account of the exclusive privilege conferred by the leases to drill for and produce oil in other parts of the leased premises not reached by the producing wells.

It would also necessarily follow if the position of counsel is well taken that the production tax would be substituted for and take the place of the ad valorem or property tax that we have held the oil leases subject to.

In considering this contention the first question that naturally suggests itself is—Was it the purpose of the legislature, in the enactment of this production tax statute, that the tax imposed should be in lieu of the ad valorem or property tax to which the oil lease covering the producing territory was subject, and if such was the intention of the legislature, did it under the Constitution have the power to provide that a production tax might be in lieu of a property tax to which the property would be subject except for the production tax?

Previous to the amendment of section 171 of the Constitution by the amendment that was adopted in November, 1915, section 171 provided in part that "taxes shall

be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law." Under this original section it was held, in *Levi v. City of Louisville*, 97 Ky. 394, that the legislature had no power to substitute a license tax or any other kind of a tax in lieu of the uniform ad valorem property tax or to classify property for taxation.

To escape the effect of this decision section 171 of the Constitution was amended as stated. By the amendment there was inserted in the original section after the words "they shall be uniform upon all property" the words "of the same class;" and there was added to the section these words: "The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation." It will thus be seen that the only change made by the amendment in the original section that is pertinent to the matter now being considered was that permitting the classification of property and the right to determine what classes should be subject to local taxation. It is further obvious that until a classification of property has been made a uniform tax must be imposed upon all the property subject to taxation within the territorial limits of the authority levying the tax, but if the property within the territorial limits has been divided, as it may be, into classes then a different tax may be imposed upon the property in each class, but it too must be uniform upon the property in that class. There can be no lack of uniformity or discrimination in the imposition of taxes upon property in the same class, and when there has been no classification the strict rule of uniformity obtains now as it did before the amendment.

It was held, as we have seen in the *Levi* case, that the legislature was prohibited by section 171 of the Constitution from substituting a license tax for an ad valorem tax, and this prohibition was continued by the amendment to section 171. It is no more allowable under the amendment to substitute a license tax for an ad valorem tax than it was before the amendment. The only character of taxes that can be imposed under section 171, either before or since the amendment, is ad valorem or

property taxes. If, by authority of the amendment, property is classified, as it may be, for taxation, the tax that is imposed on the class under this section must be an ad valorem or a property tax. Neither the rule of uniformity nor the nature of the tax was changed in any manner by the amendment. The only change was the authority to classify, but when the classification is made the tax imposed must be an ad valorem or property tax and must be a uniform tax.

The tax provided for in this legislation was a license tax on the business and not a property tax. This is made plain by the title of the act of 1917, which reads: "An act imposing a license or franchise on any person, firm, corporation or association engaged in the production of oil in this state and authorizing counties also to impose such tax . . . ; providing methods of determining the amount of tax due . . . ;" and by the title of the act of 1918, which is an amendment of the act of 1917, and recites that it is "An act to amend and re-enact . . . the act . . . of 1917, which act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this state." Thus showing very plainly the nature and purpose of the act.

Looking now again to the statute taxing the production of oil it seems perfectly plain that the legislature did not intend by this statute to make any classification of property within the meaning of the amendment to section 171 of the Constitution or to provide that the production tax should be in lieu of or a substitute for an ad valorem tax.

The authority for this legislation and for the imposition of this oil production tax is not to be found in section 171 of the Constitution. In that section there is no warrant for a production tax or any other than the ordinary ad valorem tax, and so we must turn to other sections of the Constitution to find authority for this oil production tax statute and such authority is to be found in section 181, reading in part: "The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax." Under this section, taxes of the kind described may be levied not as a substitute

for but in addition to the ad valorem tax provided for by section 171.

Under this section the legislature may provide, for example, that the merchant who pays an ad valorem tax on all his property, may be required in addition thereto to pay a license tax for the privilege of engaging in the trade or occupation of a merchant; and so the lawyer, who pays an ad valorem tax on his library and office furniture, may be required to pay in addition thereto a license tax for the privilege of engaging in the pursuits of his profession. Likewise, the blacksmith, who pays a property tax on his shop and all the tools and implements necessary to carry on his trade, may be required, in addition thereto, to pay a license tax for the privilege of carrying on his trade.

In numerous cases under it license taxes on trades, occupations and professions have been upheld, but in no one of them was it so much as intimated that the license tax could take the place of the ad valorem tax. *Elliott v. City of Louisville*, 101 Ky. 262; *Hager v. Walker*, 128 Ky. 1; *Payne v. Medicine Co.*, 138 Ky. 164; *City of Louisville v. Sagalooski*, 136 Ky. 324; *Gordon v. City of Louisville*, 138 Ky. 442.

As we have endeavored to show, the legislature of 1917 did not and could not if it had so desired enact that the oil production tax should be in lieu of or as a substitute for an ad valorem tax on any species of property. The act itself is not susceptible of this construction, but if it were, and could not be interpreted to have any other meaning, it would necessarily be in conflict with section 171 of the Constitution and therefore void.

The validity of this statute, however, and the tax imposed by it may be upheld under section 181 of the Constitution as a license tax on the business of engaging in the production of oil. It cannot be sustained on any other ground. It may be true, as argued by counsel, that this construction has the effect of imposing a double tax on the owner of an oil lease who is also the owner of an oil producing well on the leased territory, as his oil lease is subject to an ad valorem tax and the oil he produces to this license production tax; but so is the lawyer who pays a license to practice his profession and in addition a property tax on the material used in the pursuit of his profession subjected to a double tax. So, too, is the

doctor, the blacksmith, the merchant and every person who is engaged in a trade, occupation or profession on which there is imposed a license tax, and who must also pay a property tax on the property with which he carries on his business.

The legislature might have specified a fixed sum that every person producing oil should pay, or it might have provided some other reasonable and uniform method of exacting from persons engaged in the oil business a license fee for each producing well; but in place of doing this it adopted the method of imposing a license fee graduated by the quantity of oil produced, and this would appear to be a reasonable and uniform method of fixing the license fee.

It was clearly within the power of the legislature to fix a reasonable license tax to be determined by the volume of oil produced. There is no conflict in the authorities on this subject. The question was before this court in *Strater Bros. Tobacco Co. v. Commonwealth*, 117 Ky. 604. In that case a graded license tax was put by the statute upon manufacturers of tobacco based on the value of the product. In contesting the validity of this tax the tobacco company contended that it was a tax upon the manufactured product and not on the right or privilege to conduct the business and therefore being a property tax imposed under section 171 of the Constitution it was in violation thereof because not uniform. For the Commonwealth the argument was made that the tax was a license or occupation tax and not a tax upon the product.

In considering these conflicting views the court, after referring to section 181 of the Constitution, said: "The tax imposed is not levied upon property. It is simply a license tax as declared by the general assembly in the act. The Constitution not only does not prohibit the imposition of such a tax, but it expressly recognizes the right of the legislature to impose it. It not only does so, but authorizes it to be done in addition to an ad valorem tax. If the Constitution had been silent upon the question, it would have been competent for the legislature to have enacted the law." It further said: "We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufactures the same quantity of tobacco. The legislature had the right to impose a graduated license tax. The

larger manufacturer is required to pay more than the smaller one, based upon the value of the product manufactured. If all manufacturers of tobacco, regardless of the manufactured product produced by each, had been made to pay the same license tax, then a more potential argument could be made against the validity of the law for lack of uniformity and inequality of burden than has been made against the law here sought to be enforced. While this is true, we would not hold it sound. If we did, then it would logically follow that a license tax on retail liquor dealers would be invalid, because the one who sold a small quantity of liquor paid the same as the one who sold many times as much. This court has upheld ordinances imposing license or occupation tax on liverymen based upon the number of vehicles employed in their business. Such taxes are not based upon the value of the vehicles or the profit derived from their use, but upon the number employed."

The doctrine of this case was approved in *Brown-Foreman Co. v. Commonwealth*, 125 Ky. 402, and this case was affirmed by the Supreme Court of the United States in *Brown-Foreman Company v. Kentucky*, 217 U. S. 563, 54 Law Ed. 883. See further *Clark v. City of Titusville*, 184 U. S. 329, 46 Law Ed. 569; *Salt Lake City v. Christensen Co.*, 34 Utah 38, 17 L. R. A. (N. S.) 898, and the cases cited in the notes; *Gordon v. City of Louisville*, 138 Ky. 442.

In *Commonwealth v. Allen Coal Co.*, 251 Penn. 134, L. R. A. (1916F) 154, the court found no objection to the fact that the act in question provided for a tax on the value of each ton of anthracite coal produced, but it was held invalid upon the ground that bituminous coal was exempt from its operation. A like tax was approved by the Supreme Court of the United States in *Choctaw R. Co. v. Harrison*, 235 U. S. 292, 59 Law Ed. 734 (?). Another instructive case on the subject is *In Re Gross Production Tax of Wolverine Oil Co.*, Okla. 153 Pac. Rep. 362.

There being no contention that this act is either discriminatory or unreasonable there is no room to doubt that the imposition of this tax as a license tax on the privilege of producing oil was authorized by section 181 of the Constitution; nor is there any authority to be found holding that it is not competent for the legislature

to impose a license tax for the privilege of doing business in addition to the ad valorem tax that may be imposed upon the property engaged in the business.

The case of Cumberland Tel. & Tel. Co. v. Hopkins, 121 Ky. 850, is not in conflict with this view. In that case a license tax sought to be imposed for the privilege of conducting the telephone business in the city of Eminence was held invalid upon the sole ground that the company had theretofore for a valuable consideration obtained from the city the privilege to conduct its business. Therefore the imposition of an additional tax on the same privilege would be double taxation.

It follows from what has been said that the production tax on the oil produced is separate and distinct from the ad valorem tax to which the leases are subject and cannot operate to exempt them from the property tax.

It will be noticed that according to the agreed state of facts the taxing authorities of Estill county in determining the value of the leases excluded from the territory covered by the wells five acres surrounding each producing well and only estimated the value of the leases as covering the remainder of the leased premises. Whether the board of supervisors had the authority under the statute to make this exemption of five acres or any number of acres, or whether more acreage should be exempted we do not feel called on to determine in this case, as it does not appear from the agreed state of facts that Raydure is complaining of the action of the board in exempting five acres surrounding each well.

The board of supervisors, after taking out the exemption of five acres, appear to have assessed the eight leases, treating them as a whole or as one lease, of the value of two hundred and fifty thousand dollars. Under our view of the law each lease was a separate, distinct piece of property and the value of each should have been fixed by the board of supervisors without respect to the value of any other; and prejudicial error was committed against Raydure in this respect.

On a return of the case the court should hear evidence and find the fair cash value of each lease, excluding the value of each producing well thereon, estimated at the price it would bring at a fair voluntary sale and then assess it. The quantity of land that should be ex-

cluded in connection with each well we express no opinion concerning.

Wherefore the judgment is reversed with directions to proceed in conformity with this opinion.

Cassidy Coal Company v. North Fork Coal Company.

(Decided January 31, 1919.)

Appeal from Perry Circuit Court.

1. **Contracts—Action for Damages for Breach of—Submission to Court.**—Where in a common law action for damages the question of the breach of a contract is submitted to the trial court without the intervention of a jury, his decision will be treated as the verdict of a properly instructed jury, and will not be set aside unless flagrantly against the evidence.
2. **Contracts—Agency to Sell Coal.**—An exclusive selling agency contract for a term which provides that the agent will use every effort to sell the principal's coal at the highest prices obtainable, and during the dull season of April, May and June will help to keep the mines running and shall not be held responsible for a larger tonnage than actually sold during the dull season, held to obligate the agent to use every effort as a competent agent to sell the output of the mine except during the dull season, at the highest market prices obtainable.
3. **Contracts—Agency to Sell Coal.**—Where under such contract the agent during a period of six months, not in the dull season, sold less than half the output of the principal's coal mine at a lower price than inexperienced salesmen sold the same grades of coal, and failed to make settlements as provided in the contract, the agent had so violated the vital provisions of the contract as amounted to a breach thereof, and cannot complain that the principal thereafter appointed another agent and refused to quote prices to or fill orders of such original agent.

MILLER, WHEELER & CRAFT and FORMAN & FORMAN for appellants.

WOOTEN & MORGAN and MORGAN & NUCHOLS for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Both parties to this action are corporations. The appellee is engaged in operating a coal mine in Perry county, Kentucky, with its chief office at Hazard, while the appellant with its chief office in Lexington, Kentucky,

is a coal merchant and factor. On July 26, 1913, and about the time appellee began to operate its mine, it constituted appellant its selling agent by the following written contract:

"CONTRACT.

"This memorandum of agreement, or contract, made and entered into, by and between the North Fork Coal Company, incorporated, Hazard, Kentucky, party of the first part, and the Cassidy Coal Company, a corporation, of Lexington, Kentucky, party of the second part.

"Witnesseth: That party of the first part hereby agrees to give to the party of the second part, the exclusive sale of their coal mined at Hazard, Kentucky, for a period of one year from date.

"It is agreed by both parties, for and in consideration of the exclusive sale of said coal, the party of the second part will use every effort to sell at the highest price the first party's coal. It is also agreed that party of the second part will advertise, introduce and push said coal to the best possible result.

"Party of the second part further agrees in order to help party of the first part to run the mines during the dull season, which is April, May and June, to do all possible to stock coal with the trade, by taking notes from the customers, if necessary, discounting them at banks in Lexington, Kentucky. Will also help to secure steam and railroad contracts, at the highest prices possible. Party of the second part not to be held responsible for a larger tonnage than they sell during the dull season.

"Party of the second part is to sell said coal at the very highest price obtainable at all times, and they are to receive as commission on sales, 10c per ton of 2,000 pounds for all coal sold for over \$1.00 and 5c per ton for all coal sold for \$1.00 and less. Railroad weights to govern all settlements.

"It is agreed and understood that all coal sold under this contract is to be invoiced to party of the second part, at the price sold to the trade, and settlements are to be made on the 10th of the month for the preceding month shipments. Commission to be deducted when settlement is made each month.

"It is further agreed and understood that party of the second part is to exhaust every effort to sell coal, by putting salesmen on the road, advertise and push

the sales, and at such times, and such times only, party of the second part is unable to sell the entire output, then the party of the first part has the right to go out in the trade and sell the surplus, and there is no commission to be paid party of the second part for such sales. Under these conditions said coal to be invoiced direct to the trade by the party of the first part, and party of the second part is not to be held responsible for such credit, unless they agree in writing.

"Party of the first part reserves the strike clause, and are not to be held responsible for strikes, shut outs, and shortage of cars, and other causes beyond their immediate control.

"It is agreed that should any inquiries for coal go to the party of the first part, then party of the first part is to send same to the party of the second for answer.

"Party of the first part agrees to produce a merchantable coal and to prepare and clean same so it will not handicap the sale at high prices.

"It is further agreed between party of the first part and party of the second part, that party of the first part has the right to name the price from month to month for said coal, but it is understood that same must be a competitive price, and one not too high to secure business.

"Witness our hands this the 26th day of July, 1913.

"NORTH FORK COAL COMPANY.

By C. G. Bowan, Pres.

"CASSIDY COAL COMPANY.

By T. D. Cassidy, Pres.

"It is agreed and understood that should first party sell any coal to L. & N. Railroad Company, second party is to receive no commission on same.

"CASSIDY COAL COMPANY.

"By T. D. Cassidy."

On May 4, 1914, by the following written endorsement, the life of the above contract was extended:

"It is agreed that this contract be extended for one year from the expiration on July 26th, 1914, with the privilege of extending it another year from July 26th, 1915, to July 26th, 1916, unless parties of the second part make sale of this mine, and in that event the parties of the first part shall relinquish their right of renewal after

July 26th, 1915, but parties of the second part, should they sell the mine, are to use their influence to get the purchasers to let first parties the sale of the coal.

"This May 4, 1914.

"NORTH FORK COAL COMPANY.

By C. G. Bowen, President.

"CASSIDY COAL COMPANY.

By T. D. Cassidy, President."

On June 1, 1915, appellee filed this action against appellant, to recover for coal delivered upon its orders under said contract during 1915, a balance of \$129.44 for January, due February 10th; \$2,145.60 for February, due March 10th, and \$575.45 for March, due April 10th; and for \$172.75 for freight advanced on February 15th, with interest and costs, less a credit of \$191.21, for commissions due appellant.

Appellant answered admitting the several items of indebtedness, but claiming as a set off \$112.83 for various items, and as counterclaim \$3,000.00 damages for breach of the contract beginning February 24, 1915, in failing to furnish prices on its coal or accept orders and in making the Maynard Coal Company its exclusive selling agent. Appellee by reply, in addition to a traverse of the set off and counterclaim, pleaded in avoidance of the counterclaim a prior breach of the contract by appellant during the months from August, 1914, to February, 1915, in failing to sell the output of the mine, or to sell at the highest market prices, or to pay its accounts as due.

Upon these issues the case was tried before and submitted to the court, a jury being waived, resulting in a judgment for the appellee for the amount claimed less \$111.22, which is substantially the amount claimed by appellant in its set off, but dismissing the counterclaim, and the question here on appeal is whether the decision of the court, treated as the verdict of a properly instructed jury, is flagrantly against the evidence with reference to appellee's alleged breach of contract.

Upon that question the evidence is substantially that prior to August, 1914, appellant sold the output of appellee's mine at prices satisfactory to appellee, and there is no complaint that settlements were not made therefor according to the contract, but it is proven by appellee and not denied by appellant that from September, 1914, until March 20, 1915, appellant sold less than one-half of the output of the mine, exclusive of what the L. & N.

Railroad Company took; that what it did sell it sold at prices below what appellee during the same period got for the same grades of coal, in an amount something over \$500.00 on the 219 cars sold by appellant, and that during this period appellant did not settle its accounts according to contract, but was at all times behind in its payments; that appellee was constantly writing or wiring appellant to send in more orders and to pay up its account; that the appellee was frequently required to shut down its mines because of lack of orders; that its employees were leaving it and its business becoming demoralized because of the frequent shut downs; that it was required to borrow money to meet its pay rolls, which it would not have had to do if appellant had paid its accounts as due, and that it about March 20, 1915, made the Maynard Coal Company its exclusive selling agent, and thereafter refused to accept from appellant an order for fifty car loads of coal a month from March to August, 1915, or to quote it prices on its coal.

Appellant's testimony is in effect that following August, 1914, it had a salesman on the road in Ohio and sold as much of appellee's coal as it could, at the best prices it could obtain and settled therefor in a manner that appellee accepted and to its satisfaction so far as it knew, but not denying the settlements were not in accordance with the contract.

It will therefore be seen that if the contract obligated appellant to sell the total output of the mine, exclusive of what the L. & N. Railroad Company bought direct of appellee as the contract authorized, there can be no question but that the appellant had so violated the vital provisions of the contract before February 24, 1915, when it claims appellee breached it by appointing another agent as to defeat its right to complain thereof. *Harris v. Gardner*, 68 S. W. 8; *Stapleton v. Ewell*, 55 S. W. 917; *Peck v. Peck*, 102 U. S. 64, 26 L. Ed. 46.

Counsel for appellant, however, insist such is not the meaning of the contract, although they insist the contract gave to appellant the exclusive right to sell all of appellee's coal, except such as the L. & N. Railroad Company bought, a very peculiar contract indeed, if such is its effect, because it would have made appellee's ability to operate or exist as a mining company, depend upon appellant's ability to sell coal, and such a construction could be justified only if that intention were clearly expressed.

The contract in explicit terms constitutes appellant the exclusive selling agent in its very first clause, but there are several provisions that place upon appellant the duty, as we read the contract, of selling the entire output of the mine, except such coal as the L. & N. Railroad Company bought and except during the dull season of April, May and June.

The second clause states that appellant "will use every effort to sell at the highest price first party's coal" and "will advertise, introduce and push said coal to the best possible result," as the consideration for the exclusive agency.

It will be noticed this is not ordinary diligence, but requires of appellant "every effort" to sell *appellee's coal*, which can mean only *all* of the coal appellee could produce at its mine, except during the dull season especially provided for, during which period appellant agrees to help appellee run its mines, and then follows the especially significant provision that appellant is "not to be held responsible for a larger tonnage than they sell during the dull season." Can any one escape the conclusion that except during this anticipated dull season appellant was to be "held responsible" for the whole output? It does not seem so. But even if it be held that appellant was only to use such diligence as might be implied from "every effort" to be expected of a competent sales agent, to sell all of appellee's coal at the highest prices obtainable, which certainly is the least required of appellant, the evidence still convicts appellant of either incompetency or a failure to exert "every effort" it might have exerted, because during the months from September, 1914, to February, 1915, appellee's president and secretary, without any previous selling experience so far as the record discloses, when they found appellant was not sending in enough orders, although begged to do so, went out in the market and sold 384 cars to appellant's 219, at much better prices than it obtained. And when you add to this the admitted fact that appellant did not settle for what it sold according to contract and to appellee's injury, it seems to have been conclusively established that appellee was forced by appellant's failure to function as an exclusive selling agent, to abandon either its mining enterprise or its exclusive agent. This was clearly such a breach of the contract by appellant as released appellee from its further observance.

We therefore conclude the trial court's decision upon this question of fact submitted without a jury, is not only not flagrantly against the evidence, but is entirely justified by it.

The alleged breach of the contract by appellee prior to February 24, 1915, in failing to turn over to appellant inquiries and orders coming direct to appellee, is not sustained, for upon this question the testimony for appellant is simply that none were received by it, while the testimony for appellee is that prior to appellant's failure to sell its output, all such letters were forwarded to appellant, although no particular order or inquiry could be designated.

Wherefore the judgment is affirmed.

Inter-Southern Life Insurance Company v. Cooke.

(Decided January 31, 1919.)

Appeal from Daviess Circuit Court.

1. Insurance—Life Insurance—Forfeiture—Waiver.—Where a check for a premium was accepted on the condition that if it was not paid on presentation the policy should lapse, and the company treated the policy as lapsed only on the condition that the bank, on which the check was drawn, was not in error in refusing payment, it waived its right to insist on the forfeiture if, as a matter of fact, the payor had in the bank sufficient funds to meet the check, and the bank was therefore in error in refusing payment.
2. Appeal and Error—Findings by Court—Conclusiveness.—Where in a common law action, the law and facts are submitted to the court, its finding of fact will be given the same effect as the verdict of a properly instructed jury, and will not be reversed unless flagrantly against the evidence.
3. New Trial—Newly Discovered Evidence—Sufficiency.—A new trial for newly discovered evidence was properly refused where the evidence was mainly cumulative and not of such a decisive character as to render a different result reasonably certain.
4. New Trial—Grounds—Surprise—Necessity for Objection at Trial.—A reversal will not be granted on the ground of surprise, where there was no objection to the evidence alleged to constitute surprise, and no motion was made for the postponement or continuance of the case.

HELM BRUCE and BRUCE & BULLITT for appellant.

LOUIS I. IGLEHART for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,
COMMISSIONER—Affirming.

Plaintiff, Norburn E. Cooke, brought this suit against the Inter-Southern Life Insurance Company to recover on a policy insuring the life of his wife in his favor for \$1,000.00. The law and facts were submitted to the court and a judgment rendered in favor of plaintiff. Defendant appeals.

The company defended on the ground that the policy had lapsed for the non-payment of the monthly premium due January 24, 1917, and was not in force when Mrs. Cooke died on May 12, 1917. Plaintiff replied that the premium was paid within the thirty days period of grace allowed by the policy, but that if not paid within that time, it was subsequently accepted by the company, and that the failure to pay within the thirty days was waived.

The policy was issued on November 24, 1913. On the same day, a policy insuring the life of plaintiff was also issued. The monthly premium on the latter policy was \$2.24, while the monthly premium on the policy on the life of Mrs. Cooke was \$1.87. Mrs. Cooke, however, had borrowed \$16.00 on the policy and the monthly interest thereon was eight cents. Thus the amount due each month on the latter policy was \$1.95, and the amount due monthly on the two policies was \$4.19. At the time of the alleged lapse on January 24, 1917, three full annual premiums and two monthly premiums had been paid.

The trial court's findings of fact and conclusions of law are as follows:

“FINDINGS OF FACT.

“The findings of fact are in words and figures as follows:

“The court finds from the evidence in this case the facts to be as follows:

“(1) That for a considerable period prior to the first of January, 1917, the monthly premium due upon the policy involved in this case was paid by means of checks that had been executed by the plaintiff, N. E. Cooke, the beneficiary, and made payable to some bank in El Paso, Texas, and that such checks had been forwarded to the defendant at its office in Louisville at such late date as to preclude the possibility of payment to the

company by the El Paso bank within the days of grace fixed in the policy.

“(2) That at the time of the issual of the check by said N. E. Cooke of date February 17, 1917, and at the time that it was presented to the El Paso Bank for payment on March 3, 1917, said N. E. Cooke had in said bank more than sufficient funds to meet its payment.

“(3) That the defendant company, with knowledge of the fact that the payment of that check had been refused by the bank, accepted from said bank payment of the check by cashing and retaining the proceeds of the draft for the amount of the check that was issued by the bank to the defendant company of date March 26, 1917.

“(4) That the defendant company with like knowledge as to the non-payment of the check of date February 17, 1917, accepted the check of said N. E. Cooke of date March 17, 1917, upon the Security Trust & Savings Bank of El Paso, in payment of the premium due on February 24, 1917, and collected said check from said bank in El Paso on March 26, 1917, out of the funds of said Cooke in said bank and retained said sums so collected without ever having made any offer to return same to said Cooke or the assured until April 20, 1917, after defendant company had been notified by said N. E. Cooke on April 18, 1917, that the assured was then in a dying condition.

“(5) That on April 20th, said N. E. Cooke sent to the company by registered mail the sum of \$4.19 ostensibly in payment of the premium due in April, 1917, and this sum was received by the company on April 20, 1917, and returned to him on the next day by check which he received but refused to accept.

“(6) That on April 6th said N. E. Cooke purchased from the money order department of the post office in Owensboro, a postal money order for \$4.19, payable to the defendant company to be applied to the payment of the premium due March 24, 1917, which he attempted to send to the company by mail but which, the evidence shows, was never received by the company.

“(7) That the defendant company never, at any time, made any declaration of forfeiture of the policy or did any act indicating a fixed purpose to forfeit same until the tender of repayment made by it to N. E. Cooke, on April 20, 1917.

“CONCLUSIONS OF LAW.

“(1) From the foregoing facts the court concludes as matter of law that the defendant did not have the right to forfeit the policy by reason of the failure of the bank in El Paso to make payment, on March 3, 1917, of the check of date February 17, 1917.

“(2) That, if it had had any such right (the defendant waived its right of forfeiture by its failure to promptly avail itself of that right by declaring such forfeiture), and, second, by its subsequent collection of the check of February 17, 1917, and by its collection of the check of date March 17, 1917 (given in payment of premium due in February 1917), with the full knowledge of the default in payment of the preceding check of February 17, 1917, and it is now estopped, under the facts and circumstances of this case, to rely upon any rights that it may have had of forfeiture by reason of the default of payment of the check of February 17, 1917.

“These conclusions obviate any necessity for the consideration of the questions, made in the pleadings and evidence, as to whether the assured under the terms of the policy was entitled to extended insurance sufficient to cover the period to her death.”

The company relies upon the following facts to show that there was no waiver of the forfeiture resulting from the non-payment of the check given for the January premium: Plaintiff had been an agent and manager of the company and was acquainted with its method of doing business. On February 22, 1917, the company acknowledged receipt of plaintiff's letter and check for \$4.19, and enclosed premium receipt to plaintiff. On the back of this premium receipt was the following endorsement:

“CONDITIONS.

“If this premium is paid by check or note and said check is not paid on presentation, or said note is not paid at maturity, then the policy mentioned in this receipt shall lapse and become null and void, and all premiums paid on its account shall be forfeited to the company, except as provided in the policy.”

The check was deposited by the defendant in its bank in Louisville, but in due course was returned by the El Paso bank unpaid and marked, “Not sufficient funds.” On March 13, the company wrote the following letter to plaintiff:

"We regret very much to advise you that your check of February 17th, tendered in settlement of January premium under the above policies, has been dishonored at the bank on account of insufficient funds. Without this payment the policies, of course, will lapse, and it will be necessary for us to have a satisfactory proof of health before they can be reinstated. The bank may be in error in returning the check and if this be true, please take the matter up with them at once and advise us accordingly and we will be glad to deposit the check again."

A few days later the company received from the plaintiff the following letter dated March 17th:

"Referring to your letter as above, am sure there was a mistake at the bank, as I have had sufficient means to pay these premiums, so if you will find enclosed check for the February premiums on the above policies and also you can present the check for payment."

On March 21st, the company wrote the following letter to the Security Trust & Savings Bank at El Paso, Texas:

"We enclose a check drawn on your bank and returned to us unpaid. I enclose a stamped envelope and will thank you to return this check to us after having it certified, if that can now be done, and will you please advise us at the same time if this check should have been protested when first presented. Mr. Cooke thinks that it was returned unpaid through some accident for which he is not responsible and it is a matter of some importance in view of the fact that the policy of insurance is affected. We shall, therefore, appreciate your reply and a prompt return of the check."

Thereafter, the company received the following reply from the El Paso Bank, dated March 26th:

"We have your favor of the 21st, in re policy Cooke. Check for \$4.19 was enclosed and same is good at present. We have drawn our draft for that amount, and are enclosing it herewith. Beg to advise that at the time this check was presented, when we marked it 'Not sufficient funds.' Mr. Cooke's account was overdrawn and we did not feel justified in paying further overdraft. Since then he has made deposit and at present we are pleased to remit for the check."

The bank's draft for \$4.19, referred to in the letter, was received and collected by the company. Under date of April 4th, the company wrote the following letter to plaintiff:

"I regret to be obliged to advise that the Security Trust and Saving Bank at El Paso tells us that while your account is now good for the amount of recent check you sent, it was overdrawn at the time you sent us the check or rather at the time the check was returned to them for payment, and until we are satisfied that the bank was really at fault, it seems that the insurance under the above policies has really lapsed because of non-payment and we are therefore to hold your payments in suspense for the present.

"Two partial examination blanks are enclosed. If you wish to make application for reinstatement have this filled out by Dr. Wm. L. Brown, who is our examiner at El Paso."

Plaintiff had left El Paso before the above letter was received there, but a copy of it was sent to him at Owensboro in a letter of April 16th. On April 18th, plaintiff called at the company's office in Louisville and exhibited the above letter. At that time he stated that he could not submit an application for the reinstatement of his wife's policy because she was then at the point of death. He also said that the bank at El Paso was in error in stating that his account was not good when the check was presented, and that his bank book and other papers would show that this statement was correct. The company's actuary then told him that if the bank was in error in regard to the matter it would be glad to have the policy reinstated. Plaintiff replied that he thought his wife would die within the course of a few days and that the reserve on the policy was sufficient to keep the policy in force until her death. On April 20th, the company wrote to plaintiff, stating that inasmuch as no application had been made for the reinstatement of the policy, the company did not feel justified in holding in suspense the \$8.35 paid by him and enclosed check for that amount. Thereafter, the company received from plaintiff a letter dated April 19th, enclosing \$4.19 to pay premiums on policies for the month of April, 1917. On April 21st, the last mentioned payment was returned to plaintiff. Thereafter, the two checks sent to plaintiff were returned by him to the company, and the company, on April 25th, wrote plaintiff that these checks were held subject to his orders. It was further shown by the company that it kept a "Suspense Account," wherein payments subject to a return were held pending final set-

tlement, and that the draft received from the El Paso bank, as well as the proceeds of the checks sent for the purpose of paying the subsequent premiums, were deposited to that account. The bank's statement of plaintiff's account shows that when the check for the January premium was presented on March 3rd, he had to his credit only \$4.00, and that the check, therefore, would overdraw his account to the extent of nineteen cents. Plaintiff, however, testified that a deposit of \$9.00, appearing on the bank's statement to have been made on March 13th, was in fact made on February 10th.

It is argued on behalf of the company that the policy lapsed for the non-payment, on presentation, of the check given for the January premium, and that its subsequent acceptance of the defaulted premium and other premiums was not absolute, but conditional, and plaintiff, having been advised of the condition, there was nothing in the conduct of the company to mislead him to his prejudice, or to work a waiver of the forfeiture. With this contention, we cannot agree. Though it be conceded for the purpose of argument, that no affirmative action was necessary on the part of the company in order to declare a forfeiture, yet where the company did act, its conduct should have been consistent with the claim of absolute forfeiture, and not such as to indicate that the forfeiture would not be relied on. Here, the company did act, and the question is, what was the effect of its action? After the return of the check for the January premium, it did not notify plaintiff that the policy had lapsed for non-payment of the check on presentation, but wrote him as follows: "Without this payment, the policies, of course, will lapse and it will be necessary for us to have a satisfactory proof of health before they can be reinstated. The bank may be in error in returning the check, and if this be true, please take the matter up with them at once and advise us accordingly, and we will be glad to deposit the check again." Fairly construed, this language plainly meant that no forfeiture would be insisted upon if, as a matter of fact, the non-payment of the check was due to an error on the part of the bank. Insisting that there was an error on the part of the bank, plaintiff forwarded his check for the February premium and directed the company to present his check for the January premium for payment. The company sent the latter check to the bank to be certified. Instead of cer-

tifying it, the bank forwarded its draft to pay same. At the same time, the bank stated that when the check was originally presented, plaintiff's account was overdrawn. Nine days thereafter, the company wrote plaintiff that until it was satisfied that the bank was really at fault, it seemed that the insurance had really lapsed because of non-payment, and that it would hold his payments in suspense. At the same time, it enclosed application blanks for reinstatement. Not until then did the company claim that the policies had really lapsed, and even then it did not insist on the lapse, if the bank had erred in failing to pay the check for the January premium. In other words, it based its whole right to lapse the policy on the fact that no error had been committed by the bank. That being true, it treated the lapse as merely conditional, and was not entitled to insist thereon, if, as a matter of fact, the bank was in error. This being a common law action and the law and facts having been submitted to the court, its finding of fact will be given the same effect as the verdict of a properly instructed jury and will not be reversed unless flagrantly against the evidence. *Jolly's Admr. v. First National Bank*, 158 Ky. 505, 165 S. W. 677. The court found, as a fact, that the bank had sufficient funds belonging to plaintiff to meet the check in question. On this question, the court considered the statement taken from the books of the bank and the deposition of plaintiff, and we are not prepared to say that the court's finding is flagrantly against the evidence. From its finding, it necessarily follows that the bank was in error in refusing to pay the check for insufficient funds, and the company having led plaintiff to believe that it would not insist upon the forfeiture if that were true, it cannot now defeat the policy on the ground of forfeiture.

But it is insisted that a new trial should have been granted on the ground of newly discovered evidence. The motion was supported by affidavits to the effect that the plaintiff deposited with the El Paso bank, \$5.00, and only \$5.00, on February 10th, and that the deposit of \$9.00, claimed by plaintiff to have been made on February 10th, was in fact made on March 13th. It appears, however, that the cashier of the bank had already testified that the records of the bank showed that the sum of \$9.00 was deposited on March 13th. Under these circumstances, the newly discovered evidence was mainly cumulative,

and not of such a decisive character as to render a different result reasonably certain. That being true, a new trial was properly refused. *Major v. Garrot*, 157 Ky. 468, 163 S. W. 463. Indeed, the argument that defendant was entitled to a new trial seems to be based on the ground of surprise, but clearly this ground is not available, in view of the fact that no objection was made to the evidence alleged to constitute surprise, and no motion was made for the postponement or continuance of the case. *Hudson Engineering Co. v. Shaw*, 167 Ky. 27, 179 S. W. 1083.

Judgment affirmed.

**Transylvania Casualty Insurance Company v. Allen's
Administrator.**

(Decided January 31, 1919.)

Appeal from Ohio Circuit Court.

Insurance—Accident Insurance—Trial by Court—Finding of Facts—Sufficiency—Conclusion of Law.—In a suit on an accident policy, the trial court's finding of fact, that decedent's hernia was suddenly enlarged, was not sufficient to support the conclusion that the enlargement of the hernia was due to bodily injuries effected through external, violent and accidental means.

JOHN P. HASWELL for appellant.

WOODWARD & KIRK for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,
COMMISSIONER—Granting appeal and reversing.

Edward T. Allen's administrator brought this suit against the Transylvania Casualty Insurance Company to recover on an accident policy issued to the decedent. On submission of the law and facts to the court, judgment was rendered in favor of the plaintiff for \$330.00, and the defendant prays an appeal.

By the policy in question, the defendant agreed to indemnify the decedent as follows:

"ACCIDENT INDEMNITY.

"(A) At the rate of thirty dollars per month, for a period not exceeding twenty-four consecutive months

against total loss of time resulting directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, and which wholly and continuously from date of accident disable and prevent the assured from performing every duty pertaining to any business or occupation.

“(B) Or, if such injuries shall wholly and continuously from date of accident disable and prevent the assured from performing one or more important daily duties pertaining to his occupation, or in event of like disability immediately following total disability, the company will pay the assured for the period of such disability, not exceeding six (6) consecutive months, forty per cent. of the rate specified in paragraph (A); provided, the maximum period for which indemnity shall be paid under paragraphs (A) and (B) hereof shall not exceed twenty-four consecutive months for any one injury.”

The only question we deem it necessary to consider is whether the facts found by the trial court are sufficient to support his finding that the enlargement of the hernia, from which the decedent was suffering, resulted independently of all other causes from bodily injuries effected through external, violent and accidental means.

Plaintiff's evidence tends to show that the decedent was suffering from hernia at the time the policy was issued, and that this fact was known to defendant's agent. There was further proof to the effect that up to a certain time the hernia was the size of an egg, and that a day or two later it was the size of a half-gallon cup. There was an attempt to show that in the meantime the decedent had been thrown from a runaway wagon, but the testimony on this question was given by witnesses who had no personal knowledge of the facts to which they testified. Prior to the submission of the case, an amended petition was filed withdrawing the allegation that decedent's injuries were inflicted by a fall from a wagon.

The trial court's finding of facts and conclusions of law are as follows:

“The court finds the fact to be that on the 19th day of May, 1915, the plaintiff, E. T. Allen, was suffering from hernia, developed to the extent of the size of an egg (of which fact defendant's agent, who took his application for the policy sued on, had knowledge at that

time) and on the following day said hernia had developed to the size of a half-gallon cup, and there being no evidence to show the cause of such injured condition, or that it was the result of any natural cause, the court concludes from the evidence that it was caused by some unnatural means, presumably external, and further finds the fact to be that by reason of condition of plaintiff, he was incapacitated from all kinds of work, for a period of — months immediately succeeding May 20th, 1915.

“And I conclude as matter of law, under the facts aforesaid, that plaintiffs are entitled to recover of defendant, the sum of \$330.00, and their cost in this action expended.”

In order to entitle plaintiff to recover, it was necessary to show that the decedent's loss of time resulted directly, and independently of all other causes, from bodily injuries effected through external, violent and accidental means. This he could do, either by direct evidence or by proof of facts from which such a conclusion would reasonably and naturally follow.

The trial court found the fact to be that on the 19th day of May, 1915, plaintiff was suffering from a hernia about as large as the size of an egg, but that on the following day the hernia had developed to the size of a half-gallon cup. There being no evidence to show the cause of such injured condition, or that it was the result of any natural causes, the court concluded that it was caused by some unnatural means, presumably external. In other words, the court held that the mere proof of the sudden enlargement of the hernia was sufficient to raise the presumption that the enlargement was caused by external, violent and accidental means. A case might arise, where the character of the injury was such that it could not have been caused in any other way than by external, violent and accidental means, but we are not prepared, in the absence of evidence showing how hernia may be caused or enlarged, to hold that mere proof of its sudden enlargement is sufficient to place on the defendant the burden of showing that it was due to some natural or internal cause. As the case was presented, the evidence was as consistent with the theory that the hernia was enlarged by natural causes, as by external, violent and accidental means. That being true, plaintiff, in order to maintain the burden of proof, should have introduced evidence tending to negative the

theory that the sudden enlargement of the hernia was due to causes, for which no indemnity was provided by the contract. We, therefore, conclude that the facts found by the trial court were not sufficient to support the conclusion that the decedent's loss of time resulted directly, and independently of all other causes, from bodily injuries effected through external, violent and accidental means.

Wherefore the appeal is granted and the judgment is reversed and cause remanded for a new trial consistent with this opinion.

Hall v. Martin.

(Decided January 31, 1919.)

Appeal from Floyd Circuit Court.

1. Elections—Action to Set Aside—Policy of the Courts.—It is the policy of the courts to uphold the validity of elections, and before they can be set aside for fraud or other invalidating facts the proof should be clear and conclusive of the existence of such facts; and notwithstanding there may be proof of the deposit of fraudulent votes in the ballot box, if the number of such votes can be ascertained from the evidence, and it can further be determined for whom they were cast, they will be deducted from the total vote received by the person or measure for which they are cast, rather than to declare the election void.
2. Elections—Bribery—Evidence.—The fact that a worker for a candidate in the election was seen to have distributed money among five or six voters who it is claimed thereafter voted the second time is only evidence of bribery and fraud and is not of itself sufficient to throw out the vote of that precinct in the absence of some testimony to show that such voters were improperly influenced to and did vote as a result thereof, especially so as to another candidate in no way connected with the suspicious circumstances.
3. Elections—Challengers and Inspectors.—Neither the fact that a challenger or inspector is a non-resident of the precinct, although a resident of the county, nor the further fact that after the polls closed the ballot box was taken to a nearby place where the votes were counted and where there was both light and heat, neither of which was obtainable at the polling place, is sufficient to render the election at that precinct void so as to require that it be entirely rejected.

4. **Elections—How Conducted.**—By section 147 of the Constitution and Statutes enacted pursuant thereto, elections are required to be by secret ballot, and if the legal requirements for that purpose are violated to such an extent that as many or more than twenty per cent. of the voters cast their votes openly without being sworn as required by law, the election would have to be declared void.
5. **Elections—When Contest Will Fail.**—Notwithstanding it appears from the proof that the number of illegal votes alleged were cast, still if contestee has a majority, after deducting such votes, relief will be denied the contestant and his petition will be dismissed.

EDWARD C. O'REAR, J. C. JONES and ROSCOE VANOVER for appellant.

C. B. WHEELER for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming on the appeal and reversing on the cross appeal.

This litigation is a contest over the office of jailer of Floyd county. The appellant, Hall, and appellee, Martin, were rival candidates for the office at the regular November, 1917, election, the former being the Republican candidate and the latter the Democratic candidate. There were canvassed and certified by the election officers of the various precincts 2,061 votes as having been cast for appellee, and 1,941 votes cast for appellant, giving the appellee a majority of 120 votes. In due time the canvassing board of the county met and verified the result of the election and found in the jailer's race as certified by the election officers.

Within the time required by law, but before any certificate of election was issued, this suit was filed by appellant as plaintiff contesting the election of appellee and defendant upon various grounds alleging fraud and irregularities which if true resulted in illegal votes being counted and certified for defendant in a greater number than his apparent majority, and that he (appellant) obtained a majority of the legal votes cast in the election and should be declared the duly elected jailer of the county.

Defendant insisted that the contest was prematurely filed, it being claimed that under the provisions of subsection 12 of sec. 1596a of the Kentucky Statutes the suit was not maintainable until after the canvassing board had issued its certificate of election. That section

provides that the contest shall be instituted within ten days "after the final action of the board of canvassers," and under the doctrine announced in the case of *Ward v. Howard*, 177 Ky. 38, such "final action" for the purpose of contest proceedings is held to mean the time when the board ascertains the result of the election and not when it issues its certificate of election. Under the ruling of that case this contention can not be considered.

The answer denied the allegations of the petition and included paragraphs containing counter grounds of contest. Various motions were made and amendments filed, and after the parties had taken their proof and the cause submitted, the petition was dismissed, and to reverse that judgment this appeal is prosecuted, and defendant has prayed and obtained a cross appeal.

In the petition general charges are made that in the election more legal votes were cast for plaintiff than were cast for defendant; that the officers of election fraudulently counted and certified votes in the jailer's race for defendant, and that a true and correct count of the ballots would show that plaintiff was duly elected to the office; that bribery had been resorted to by defendant, or by his friends with his knowledge and consent, to such an extent as to render the votes cast for him void, and in addition to such general allegations the plaintiff further charged that in Martin precinct there are not more than three hundred legal voters and that all of the votes which defendant received therein were cast for him openly on the table without the voters being sworn as required by law; that one Tom Lawhorn was permitted without right to go into the polling place at all times during the day while the election was being conducted in that precinct, he as alleged not being a citizen either of the county or the precinct, and that he bribed persons to vote for the defendant; that at least fifty votes in that precinct were fraudulently cast for the defendant through fictitious names gotten up by the election officers, or that number were cast by persons who were non-residents of the district, or under twenty-one years of age, or who were for other reasons illegal voters, but which one plaintiff does not know; that there was a conspiracy in the Martin precinct between defendant and the Republican candidates for the offices of sheriff, representative in the legislature and county attorney to wrongfully, illegally and corruptly "steal the

election" at that precinct, and that the officers at that precinct after the closing of the polls wrongfully, illegally and fraudulently removed the ballot box to another building located some 250 or 300 yards from the polling place, where the ballots were counted. The additional allegations are made that in a number of other named precincts at least fifty votes in each of them were wrongfully cast for defendant by being voted upon the table without the statutory oath being administered to the voter.

By way of counter contest the defendant charged that the election in Clear Creek and Antioch precincts should be set aside and held for naught for various reasons, chief among which was that the law requiring secrecy in the casting of ballots was wholly ignored, since more than one-half of the votes were cast upon the table without the voters being sworn as required by law, and that all the other votes cast in the Clear Creek precinct were subject to the same criticism because as alleged in that precinct there was no booth provided, nor any place wherein the voter might secrete himself for the purpose of marking his ballot. Amended pleadings attempted to name the number of votes charged by such general allegations to have been illegally cast, and by whom cast, and in arriving at the judgment appealed from the court threw out entirely the Martin and Clear Creek precincts, reduced the vote of each candidate at Antioch precinct forty-five per cent., that being the court's finding from the testimony of the number of votes cast upon the table without being sworn, and deducted from appellant some eighty odd votes in all the other precincts as having been cast for him openly without the voter being sworn, resulting in finding defendant elected by a majority of eleven votes. Appellant did not at the trial demand a recount of the ballots or offer to do so.

The chief complaint made by appellant on this appeal is error committed by the court in throwing out Clear Creek precinct, and in deducting from his total vote forty-five per cent, or any number of votes which he received at Antioch precinct, and in not deducting from appellee certain questioned votes in other precincts. By cross appeal appellee calls in question the judgment of the court in throwing out Martin precinct.

To undertake to discuss the various issues of fact touching each individual contested voter, and each piece of conduct claimed to constitute fraud, would carry this

opinion far beyond legitimate bounds, and is a task which we are disinclined to undertake, inasmuch as we have concluded that the court was in error in throwing out Martin precinct. With this precinct counted, and deducting from the votes certified in that and other precincts as having been received by each candidate all illegal votes properly pleaded and in support of which there is any testimony, defendant will then be found to have received a majority of the legal votes cast. In the Martin precinct defendant received three hundred and eighty-four votes and plaintiff eleven votes. Within the boundary of that precinct there are three mining towns, one or two of which have municipal organizations and a regular set of officers. Some eight or ten coal mines located therein are in active operation, and within the limits of the district, there is a population of between 2,500 and 3,000 people. These facts contradict the charge of an abnormally large vote polled there. The uncontradicted testimony shows that the defendant is related to a very large per cent. of the native voters in that district, and the Republican candidates with whom he is charged to have entered into a conspiracy also have an extensive number of relatives therein. The precinct is normally Democratic. There is some evidence of a mutual understanding that the relatives of the associated candidates would support each of them, and that neither would antagonize the other. In other words, the understanding went no further than that neither candidate in the combination would insist upon party lines, and that each would endeavor to secure for himself the influence and votes of the relatives of all, and thereby pool their combined strength for each of them. But it is not shown that even this much was agreed to or known by the appellee. There is no testimony to show that any fraud was perpetrated by any one in carrying out this understanding, which in itself is neither illegal nor fraudulent. It is insisted that the activities of Lawhorn in furtherance of the understanding constituted such fraud. The testimony shows that he, although a resident of the county, living at Prestonsburg, was not a resident of that precinct. However, he was appointed challenger for the precinct by the Republican county committeeman and held credentials from the Democratic committeeman as inspector for the precinct. The latter credentials were attacked, and it was shown that the Democratic county commit-

teeman appointed another as inspector for that precinct but the appointee declined to serve and inserted in the certificate of appointment the name of Lawhorn. We know of no law disqualifying a legal voter in the county from serving as challenger or inspector at any precinct therein.

There is testimony to show that about the noon hour of the day of the election Lawhorn was seen in conversation with four or five colored voters, and to have given money to some of them. This, however, is denied by Lawhorn. Whether true or not, the fact remains that not a syllable of testimony connects Lawhorn with the defendant. On the contrary, it is shown that he was interested only in the election of the candidate for sheriff and perhaps the one for county attorney. Nothing fraudulent whatever is shown by the testimony to have occurred at the polling place. It is not shown that Lawhorn or any of the election officers did anything at the polls that in the least smacked of fraud, either in the way of bribing voters or in any other particular charged as a ground of contest. If it be conceded that Lawhorn did distribute money to a small number of colored voters, and that he did so for fraudulent purposes, it is not shown by any testimony that such purpose was accomplished or that any such acts were fruitful in causing any ballots to be deposited in the ballot box. On the other hand it is testified to by the officers of the election that when about that number of colored people attempted to vote the second time they were not allowed to do so and were ordered out of the polling place. If, however, we discard all of this testimony and concede that these six or seven voters wrongfully voted the second time, then, as we shall hereafter see, the result of the election is not affected.

By an amended petition plaintiff undertook to set out the names of the persons whom he claims constituted the fictitious, repeated and other illegal votes which were cast in the Martin precinct. These aggregate one hundred and six votes, and if all of them were conceded to be proven illegal, as alleged, and all of them charged to defendant, he would then have a majority of two hundred seventy-eight votes in that precinct, giving him a majority in the county of fourteen votes without making any allowance for illegal votes proven to have been cast for appellant at other precincts and relied upon in the counter contest.

We are not inclined to give the weight to the alleged fact of the removal of the ballot box for the purpose of counting the ballots which plaintiff insists upon. The facts about this matter are that the room in which the election was held, although provided with booths, was small and but one opening in it for the admission of light. At the time of the closing of the polls it was too dark in the room to enable the officers to count the votes, and they were without lamps. Furthermore, it was cold; they had neither stove nor fireplace in which a fire could be built. All persons present, including all of the election officers, agreed to adjourn to a comfortable room in a hotel some 250 or 300 yards away from the polling place. Not the slightest circumstance or suspicious fact appears in the testimony to show that this was resorted to for the purpose of or resulted in any fraud or dishonest act of any character. On the other hand, both Democrats and Republicans say that it was the only practical thing to do. While we would not be understood as giving our unqualified endorsement to the removing of the ballot box from the polls until after the vote has been canvassed and certified by the officers holding the election, yet under circumstances like those found in this record, when the act is shown to have been in perfect good faith, we can find no legitimate objection to the course pursued. It may be that it was upon this ground that the circuit court rejected in its entirety this precinct. But whether so or not, we are convinced that neither this nor any other ground relied on was sufficient for that purpose. If there exists such a disregard of the requirements of the law relative to guaranteeing fair and honest elections, and there appear such fraud, dishonesty and intimidation as to render the result of the election doubtful, courts not only have the right but it is their duty to adjudge the election in that particular precinct void. Before doing so, however, the evidence should point unerringly to the establishment of the invalidating facts. We find no such testimony in this case relative to Martin precinct. In fact, with the exception of the alleged activities of Lawhorn in connection with the half dozen or more colored voters, the record discloses nothing as occurring in that precinct out of the usual and ordinary, unless, as insisted, the removing of the ballot box for the purpose of counting the vote under the circumstances was not an ordinary proceeding.

With this view of the case it is really unnecessary to consider the facts relative to the votes cast in the other precincts involved. If, however, it were necessary to a decision of the case, we would be compelled to hold, under the doctrine announced in the cases of *Harrison v. Stroud*, 129 Ky. 193, and *Cole v. Nunnelley*, 140 Ky. 138, that the election in Clear Creek and Antioch precincts were void, since it is indisputably shown that in each of them anywhere from one-third to more than one-half of the votes cast were done so in the open, on the table, without any of the voters being previously sworn, and as stated in the cases referred to such a method of voting is illegal as violative of the provisions of sec. 147 of the Constitution providing for a secret ballot, and when as many as one-fifth (being the number in those cases) of the votes cast are voted in that manner, the election should be declared invalid.

In the *Stroud* case the testimony showed only about twenty per cent. of the voters in the precinct contested to have voted openly, upon the table, without being sworn, and in passing upon the effect which that fact had upon the election this court said: "And when the officers permit such numbers of voters to violate the secrecy of the ballot, as was done in this case, as to materially affect the result of the election, it is not a lawful election, and will be held void on that account. *Attorney General v. Stillson*, 108 Mich. 419, 66 N. W. 388; *Sproule v. Fredericks*, 69 Miss. 898, 11 South. 472. Such an election is but a partial election. Instead of ascertaining the popular will, it frustrates its legal expression. It would substitute the result of fraud or gross official ignorance and misconduct for the result of legal votes legally cast."

If we should apply the doctrine of that case to the facts proven with reference to Clear Creek and Antioch precincts, it would result in giving defendant some two or three hundred greater majority than the canvassing board awarded him, which majority would not be consumed by deducting from defendant's total vote all the legally contested votes in all other precincts in support of which plaintiff has introduced any evidence, and this, too, if Martin precinct be wholly rejected. In that event plaintiff's vote would be one thousand five hundred forty and that of defendant one thousand five hundred seventy-three, giving him a majority of thirty-three votes.

These conclusions render it unnecessary to consider other questions in the case, and the judgment on the appeal is therefore affirmed, and reversed on the cross appeal with directions to dismiss the petition.

John Druzille, Wood-Heck, et ux. v. Roll, et al.

(Decided January 31, 1919.)

Appeal from Muhlenberg Circuit Court.

1. **Attorney and Client—Contract for Services—Champerty and Maintenance.**—A contract, for services, with an attorney under which costs are to be deducted from the proportion due the attorney is not champertous, but merely affects the quantum of fee. The residue, after deducting the costs and expenses, constitutes the fee payable under the contract.
2. **Attorney and Client—Services—Settlement.**—Under a valid contract between an attorney and client the fact that the client negotiates a settlement without consulting with the attorney does not deprive the attorney of his right to recover under the contract; the attorney having rendered considerable services and would have participated in the final settlement had he been requested so to do.
3. **Trial—Submission to Court.**—Where the facts of the case are undisputed and but one legitimate inference can be drawn therefrom the court, and not the jury, should determine their effect.

DOYLE WILLIS for appellants.

HERBERT O. MEREDITH for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellants (defendants) employed the appellee, R. M. Roll, an attorney, to represent them in the settlement of their rights in and to the estates of J. W. Wood, et al., and to do all things necessary to procure for the defendants the amount due them from said estates, and to attend to such litigation as might be necessary, authorizing said attorney to employ such additional counsel as he might desire, the fee of such additional counsel to be paid out of appellee's fee and the attorney was to pay any personal expenses incurred by counsel. The fee was to be an amount equal to one-third of the amount procured.

Following the signatures to this contract appears this statement: "This is to certify that I, D. M. Roll, agrees to pay the costs out of the third of the amount paid to said Roll for his services. D. M. Roll, atty."

This contract was assigned to the firms of Robinson & Stillwell and Jonson, Wickliffe & Jonson, one-half each, the share of the former being subject to a certain credit.

Demurrer to the petition was filed and overruled, the defenses set up in the answer being, that the contract sued on was champertous, unfair, unjust and unconscionable, and was obtained through the false and fraudulent statements of R. M. Roll, as to the extent of work necessary, and also that Roll had failed to perform the services specified, and instead of \$1,000.00 (being one-third of the amount received by appellants), the services of said Roll were not worth more than \$250.00.

At the close of all the evidence, the court having peremptorily instructed the jury to find for the plaintiff, and judgment being entered accordingly, this appeal is prosecuted. Appellants contend that the contract is champertous and that the court erred in giving the peremptory instruction.

1. We do not think the agreement to pay costs rendered the contract champertous, because it was nothing more than fixing the attorney's fee at a sum equal to one-third of the amount recovered, less costs. In other words, the appellants desired the sum coming to them to be net, and plaintiff's fee was not to exceed \$1,000.00, but this amount might be reduced to the extent of any costs incurred. As a matter of fact it appears that in the settlement appellants were not required to pay any costs.

Ramsey's Devises v. Trent, 10 B. Mon. 336, is a case directly in point on this proposition. In that case the attorneys were to have as their fee "one-fourth of the proceeds of the sale of said land when sold by them, out of which fourth the costs and expenses of the suit were to be deducted. . . ." It was contended that this contract was champertous. After referring to the case of Wilhite v. Roberts, 4 Dana 172, the court says: "The court was of opinion that this was not an agreement to give 'part or profit out of the thing in contest,' and there-

fore not champertous. And it was farther said, in that case, that the litigant might regulate his attorney's fee by the value of half of the value of the property in contest, as well as by the value of any other property.

"The material difference between the contract then before the court and that now under consideration consists in the fact that in the present case the attorneys are to wait for their fee until the employers sell the land. All else relates merely to the quantum of the fee. And although the amount of the expenses and costs is to be deducted from the one-fourth of the value of the land and the attorneys are to receive the residue only of the one-fourth thus diminished, this residue constitutes their whole fee. The expenses, &c., are not to come out of their fee, nor to be paid by them, nor to be postponed until the land is sold. But the employers have to pay the expenses and costs as in other cases, and after reimbursing themselves out of one-fourth of the value of the land when sold, the balance of the fourth is to be paid as a fee."

We do not think the court erred in overruling the demurrer to the petition.

2. W. C. Jonson, an attorney and one of the assignees of the contract testified at great length as to the services rendered by the attorneys in this case, and it is clear from this testimony, as well as the testimony of certain of the defendants' witnesses, that the attorneys did render considerable services under the contract.

It is in evidence that the first proposition of settlement was for \$750.00; later this was raised to \$3,000.00, and the settlement on this basis was agreed to without consulting the attorneys. As a matter of fact they had advised the appellants that in their judgment they should receive more, but the fact that settlement was made without the knowledge of the attorneys does not in any wise affect their rights to recover because, as said in *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598: "It is also well established by the decisions that when an attorney makes a valid contract with his client, by which he is to be paid a contingent fee in an amount equal to a specified part of the recovery, and the defendant or person against whom the claim is asserted, with notice of the contract of the attorney, and without his consent settles with his client, that the attorney may recover from him the

amount of his contract fee." See *Proctor Coal Co. v. Tye & Denham*, 123 Ky. 381; *L. & N. R. Co. v. Payton, &c.*, 20 R. 75.

The appellant, Joe D. Heck, in company with his wife, consulted Mr. Roll about their interest in the estates in question. They had never had any business with him before, and after they had explained the matter to him he suggested the case might involve considerable work. This was based upon the facts given him by the appellants. The contract was then signed. Appellant Heck claims that the attorneys did little, if anything, after their employment, but the proof in the case shows to the contrary; nor is there any evidence of fraud, or that appellants were overreached in any way.

The attorney for Mr. Wood testified that he was familiar with the litigation and did not think a fee of \$1,000.00 unreasonable; and he never met the attorneys, while the suit was pending, that they did not have something to say about the lawsuit, and in his judgment they attended to it in an efficient manner.

We find no evidence upon which the court could have submitted this case to the jury.

Where the facts of a case are undisputed, and but one legitimate inference can be drawn from them, the court, and not the jury, should determine their effect. *Western Union Tel. Co. v. Smith*, 164 Ky. 270; *Same v. Teague*, 134 Ky. 601; *L. & N. R. Co. v. Earle's Admr.*, 94 Ky. 374; *Thompson v. Brannin*, 19 Rep. 454.

The judgment is affirmed.

Rieke's Administrator, et al. v. Rieke, et al.

(Decided January 31, 1919.)

Appeal from McCracken Circuit Court.

1. **Executors and Administrators—Removal.**—Administrators have such an interest in the execution of their trusts as entitles them to protection from removal without just cause.
2. **Executors and Administrators—Removal.**—The assertion by an administrator with the will annexed of an interest in the estate as the surviving husband of one of the devisees, not admitted by the other parties interested therein and friction resulting therefrom,

and a controversy as to the value of his services, do not prove him incapable of discharging his trust, or furnish cause for his removal under section 3846 of the statutes.

JOHN K. HENDRICK and JOE McCARROLL for appellants.

MOCQUOT & BERRY for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

W. H. Rieke died testate in December, 1910, a resident of McCracken county. By his will he devised all of his property to his five children, providing, however, that his real estate, all of which was located in Paducah, should be held intact for fifteen years, the net income therefrom to be collected and paid by his executors in equal shares to his children every sixty days; "that at the end of the fifteen years, said real estate shall be divided equally between them if they so desire," and "that if either of my children shall die without leaving issue, then the portion of the child so dying shall be divided equally between the remaining children or their bodily heirs."

All five of his children were named as executors, but upon their joint motion, appellant, J. E. Cooper, the husband of one of the daughters and who resided at Hopkinsville, Kentucky, about eighty miles from Paducah, was appointed and qualified as administrator with the will annexed. He admittedly discharged his duties of trust in an apparently satisfactory manner until in 1916. In March of that year, upon a partial settlement of his accounts, he was allowed by the county court \$2,513.54 for his services, which upon exceptions and appeal to the circuit court was reduced to \$1,500.00. In May, 1916, his wife died, without any children having been born to her, a resident of Christian county, Kentucky, and appellant was appointed and qualified as her administrator. After her death appellant, as he had theretofore done, continued to pay to the four surviving children of W. H. Rieke, one-fifth each of the net income of the real estate, and deposited in bank the remaining one-fifth, the share his wife if alive would have taken, to his credit as her administrator.

On February 3, 1917, the four surviving children of W. H. Rieke gave appellant notice that on February 15th they would appear before the judge of the McCracken

county court, and move to have him removed as administrator with the will annexed of W. H. Rieke, for cause then to be shown.

Upon a trial of this motion, the evidence not being here, the county judge removed appellant as administrator, delivering a written opinion made a part of this record, in which after holding an administrator could not be removed except for cause, he says:

"This case must present itself to the mind of the court in this wise—here is one acting in a fiduciary capacity, who was validly appointed as such, a most capable man from every view point, his bond is sound, and the very best, the estate has prospered under his excellent administration and his personal conduct and good standing as a citizen and clear-headed business man have not been questioned."

But finds cause for removal because (1) of "severest friction" between appellees and appellant, (2) appellant resides eighty miles from the property, and (3) a controversy has arisen between appellant and appellees as to the proper construction of the will with reference to the share which Mrs. Cooper, if alive, would have taken.

This opinion of the county judge, although a part of the record, probably has no place in this opinion, as the case was tried *de novo*, and possibly upon evidence of different witnesses in the circuit court, but it states so clearly the effect of the evidence in the latter court and the only possible "causes" for removal deducible therefrom, it is used in the absence of an opinion by the circuit court judge for convenience in presenting the question before us for decision.

It is conceded that it is well settled by the numerous decisions of this court, among which are *Dunlap v. Kennedy*, 10 Bush 539; *Williams' Admr. Ex parte* 158 Ky. 61, and *Davis's Admr. v. Ruth Davis*, 162 Ky. 318, that administrators have such an interest in the execution of their trusts as entitles them to protection from removal without just cause, but it is insisted by counsel for appellees that such cause was shown as warranted appellant's removal under that portion of section 3846, Kentucky Statutes, reading: "or become otherwise incapable to discharge his trust," upon the theory that this means "any condition in which the representative may find himself that makes his position as an individual antagonistic to his position as a representative or trust-

tee under the terms of his appointment," it being contended that appellant's claim to a right to participate in the share of his wife, puts him in such antagonistic position.

No authority whatever is cited to support such a contention, and we are sure there is none, because sec. 3896 of our statutes, a part of the same chapter as section 3846, all of which relates to the appointment, removal and duties of personal representatives, requires the appointment of relatives of the deceased, if any apply to administer, giving preference to the surviving husband or wife, and then such others as are next entitled to distribution, although these preferred parties always necessarily have interests antagonistic to others entitled to participate in the distribution of the estate.

Would any one seriously contend that if one of the sons had accepted the appointment and qualified, appellant upon the death of his wife could have had him removed simply because he claimed an unadmitted interest in his deceased sister's share in the estate, or denied appellant's claim thereto? Certainly not, and yet that is all appellant is doing so far as we can discover. The sole causes of dissatisfaction with appellant seem to have been the disagreement about the value of his services and his refusal to accede to appellees' construction of the will, but neither of these disagreements about legal rights furnish cause for his removal, nor does he thereby "become incapable to discharge his trust." Nor does "severest friction" arising from such disagreement or his residence out of the county, but in the state, furnish such cause as seemingly counsel admit by not mentioning either of these circumstances in brief.

Appellant may or may not be wrong in his construction of the will, or rather in his claim thereunder, based upon the construction of his counsel, about which we express no opinion, as that question is not here; and as no cause was shown for the removal of appellant, the judgment of the circuit court removing him is reversed, and the cause remanded with directions to overrule the motion.

**Mountain Central Railroad Company v. Drake's
Administrator.**

(Decided January 31, 1919.)

Appeal from Wolfe Circuit Court.

1. **Master and Servant—Appliances—Res Ipsa Loquitur.**—The doctrine of *res ipsa loquitur* is not applicable between master and servant unless there is other evidence, however slight, of some negligence of the master; nor would it apply even then where the injured servant was operating and had charge of the defective appliance or contrivance which produced the accident, and whose duty it was to inspect or repair or notify the master of the defects.
2. **Master and Servant—Negligence—Appliances.**—Before a master can be held liable to his servant there must be some evidence to show negligence on his part, and there can be no negligence without the violation of some duty. Where it is the duty of the servant to inspect and repair the machinery, or notify the master of the defects, the latter is not in fault until he has received such notification, and if the servant fails to inspect or repair or notify the master, and continues to work, he will be deemed to have assumed the risk and can not recover from the master for any injuries sustained.
3. **Master and Servant—Assumption of Risk.**—A servant was employed to operate a stationary boiler and engine, having complete charge of it. He was an experienced man and had operated the machinery for seven or eight years. Under the terms of the employment he had complete control of it and it was his duty to repair it or to notify the master of necessary repairs. No such notification was given and the boiler exploded, killing the servant. Held that the master was not liable, since the risk was assumed by the servant.

G. C. ALLEN, B. R. JOUETT, S. MONROE NICKELL and A. FLOYD BYRD for appellant.

E. C. HYDEN for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellant and defendant below, Mountain Central Railroad Company, is a corporation, and owns and operates a narrow gauged railroad between Campton Junction, in Powell county, and Campton, in Wolfe county, a distance of about fourteen miles. About midway between those points it maintains a water tank to supply its engines. The tank is supplied with water by a

pump operated by a small, upright, stationary engine. For some seven or eight years prior to December 7, 1915, Alex. Drake, a man about 73 years of age at the time of his death, was employed to and did operate the engine and boiler so as to keep the tank supplied with water, which duties required about three hours of his time two or three times per week. He lived near the pumping station, and operated a small grist mill and ran a small country store. On the day mentioned the pump which carried the water to the tank was out of repair and was being worked on by Drake, after he had fired the engine preparatory to pumping some water, when the boiler exploded and killed him. Appellee, who was plaintiff below, qualified as his administrator and brought this suit against the defendant to recover damages for the death of decedent upon the grounds that defendant had negligently failed to perform its duty in furnishing decedent a reasonably safe place in which to work, and in failing to furnish him reasonably safe machinery with which to do his work.

The answer traversed the allegations of the petition and pleaded both contributory negligence and assumed risk, which were denied, and upon trial there was a verdict in favor of plaintiff for the sum of \$1,000.00, upon which judgment was rendered, and complaining of it the defendant prosecutes this appeal.

Numerous grounds are urged for reversal, but the chief one is that the court erred in declining to instruct the jury upon defendant's request to return a verdict in its favor. Since we have concluded that this ground is well taken, it will be unnecessary to enumerate, much less consider, the other grounds relied on.

At the outset it may be stated that under the facts of this case there is no room for the application of the doctrine of *res ipsa loquitur*, since were there no other objection it does not apply as between master and servant unless there is some evidence, although slight, of the negligence of the master other than the happening of the accident. *L. & N. R. R. Co. v. Allen's Admr.*, 174 Ky. 736; *Wright's Admr. v. Elkhorn Consolidation Coal & Coke Co.*, 182 Ky. 423, and cases therein referred to. But even for the doctrine to be applied under the circumstances mentioned the accident must have happened because of defects of appliances or machinery not operat-

ed by or in charge or under the control of the injured servant, but operated by or in charge or under the control of the master or some servant other than the injured one and for whose negligence the master would be liable. This limitation of the application of the rule must necessarily follow from the reasons out of which the rule was evolved. They are that the accident being susceptible of no other explanation will be *prima facie* presumed to have resulted from the negligence of the master or of some other servant who had the particular appliance or machinery in charge. No such presumption could arise against the master in favor of the servant who himself operated or who had the defective machinery or appliance in charge, since in that case there would be no greater presumption of the master's negligence than there would be of the injured servant's negligence.

The disposition of this case, then, must depend entirely upon the application of the facts as disclosed by the record to well known principles of law. There is no evidence in the case pointing to any reason for the explosion except it is shown that such an occurrence would hardly happen save in one of two ways—either because of an excessive amount of steam generated in the boiler or by turning cold water in the boiler while it was hot, whereby a very high power gas is produced.

The expert witnesses who testified in the case gave it as their opinion that the particular explosion must have been produced in one of these ways. The plaintiff showed by his proof that the boiler was an old one. Some of the witnesses testified that the flues in it had been in some respects out of repair, but at the request of the decedent, and in his presence, the defendant had repaired them some time before the accident, and there is nothing to show that any complaint was made by decedent concerning them.

It is further shown by plaintiff's evidence that the safety or fusible plug with which some boilers are equipped for purposes of safety was stopped up, and that the opening was not filled with babbet or other safety material as contemplated by the manufacturers. There is no evidence, however, to show how these conditions were created, i. e., whether by the defendant, one of its servants, or by the deceased himself, nor is there any

evidence to show that there would have been no explosion had this equipment been in the best of repair.

For the defendant it appears without contradiction that when deceased was employed to manage and operate the pumping plant, which included the engine and boiler, he was given "full charge of the management and operation of the boiler, and was required to and did do all the inspecting and repairing of same and keeping same in proper condition, and such was his contract and nature of his employment."

Thomas Drake, the son of deceased, testified that his father would notify defendant when anything connected with the boiler or any of the machinery under his charge would get out of repair, and defendant would send someone to fix it. Another witness testified that some time before the explosion the deceased told the witness that he had charge of the boiler and did not need the help of anyone else in operating it. In the light of the uncontradicted testimony, there is no escape from the conclusion that under his contract of employment it was the duty of the deceased to inspect and repair the boiler, or to inspect and report to the master any repairs found to be needed. He had made no such report at the time of the accident. Under these conditions the doctrine of the cases of *L. & N. R. R. Co. v. Foley*, 94 Ky. 226; *C. N. O. & T. P. Ry. Co. v. Ashcraft*, 116 S. W. (Ky.) 297, and others relied on by plaintiff's counsel, have no application, since in neither of them was the servant under any obligation to inspect or make repairs. The court in those cases applied the ordinary rules of negligence of the master independent of any such duties on the part of the servant. On the other hand, this court has decided in a number of cases that under facts similar to those appearing in this case the master is under no duty to make the machinery or appliances reasonably safe unless he has been requested by the servant to do so and negligently failed to comply therewith. *Buey's Admr. v. Chess & Wymond Co.*, 27 Ky. Law Rep. 198; *Harper v. I. C. R. R. Co.*, 131 Ky. 225; *C. N. O. & T. P. Ry. Co. v. Skinner*, 143 Ky. 342, and *Eagle Coal Co. v. Patrick's Admr.* 161 Ky. 333, and cases referred to therein.

In the *Buey* case, *supra*, the injury complained of was inflicted by alleged defective machinery. The court

found that "It was the duty of Edward F. Buey to report the condition of his machine to the foreman of the shop when it became out of fix. He also repaired it at the direction of the foreman." Further along, in applying the law to the facts this language is used:

"They (masters) cannot actually know the condition of every piece of machinery or tool at every instant of its use. The workman who has it in immediate charge has the best opportunity for learning of such defects as may occur at any moment, and are open to his view. It is his duty to report it so that it can be repaired. If he fails in that duty the master may or may not be liable if some other person is injured by it, but if the neglectful servant himself suffers an injury from it, the master having no knowledge of the situation, it is a safe rule that lets the negligent servant bear the consequences of his own action."

Commenting upon the rights of the parties under such circumstances, the court, in a later part of the opinion, says:

"His (the servant's) familiarity with the machine, and the fact that he had successfully operated it for many years, tends to prove his familiar acquaintance with it, as well as his actions at the time afford evidence of what he knew on the subject of its condition and danger to him." It was finally concluded that as a matter of law decedent's injury and death were the proximate result of his own negligence.

In the Eagle Coal Company case the Buey case is referred to and approved, the court saying: "By the contract of hiring or by mutual understanding or custom, in the absence of a statute, the burden of making such inspection of the working place as the servant is qualified to make may be imposed upon the servant. *Buey v. Chess*, 84 S. W. 563, 27 R. 198; *Old Diamond Coal Company v. Denny*, 160 Ky. 554; *Borderland Coal Company v. Small*, Admr., 160 Ky. 738."

It would seem that those cases are amply sufficient to settle the questions raised by the motion for a peremptory instruction in favor of the defendant. Indeed the doctrine which they announce was applied to facts quite similar to if not identical with the ones we have here. In each of them it was the duty of the servant to inspect and repair, or report to the master

so that he might repair. This, as we have seen, is exactly what this record shows was the duty of the deceased, and we see no escape from the conclusion reached in those cases.

The reason for the foregoing rule relieving the master of liability to the injured servant whose duty it is to inspect and report defects is perfectly apparent. Negligence is the violation of some duty which the party charged with it is under obligations to perform, and necessarily if there is no duty to do the thing complained of there could be no negligence in failing to do it. *Kentucky & Tennessee Ry. Co. v. Minton*, 167 Ky. 516. The duty of the master to repair, in cases like this, arises only when he is notified by his servant of the necessity of such repairs, and if the servant fails to give such notice and continues to work, he assumed the risk, and if injured he can not look to the master.

We therefore conclude that because of the error complained of the judgment is erroneous and should be and is reversed for proceedings consistent with this opinion.

Maynard v. Thompson.

(Decided January 31, 1919.)

Appeal from Pike Circuit Court.

1. Pleading—Amendments.—Where a defendant styled his pleading “amended petition” by which a new defendant was brought into the action by summons thereon, the responsive pleading of the latter styled “Answer, Counterclaim and Cross Petition” although as a cross petition directed against other defendants, will be treated as an adverse pleading to the claim to the land in dispute of the defendant, who styled his pleading an “amended petition.”
2. Adverse Possession—Limitation of Actions—Pleading.—When limitation or adverse possession is pleaded as a bar to the title asserted by an adverse party, it must be traversed and if any disability is relied upon to avoid the running of the limitation statute, it is new matter and must be pleaded; and the rule applies to married women no less than other persons laboring under disability.
3. Adverse Possession—Finding of Chancellor.—Appellee’s claim of title by more than thirty years’ adverse possession of the land in dispute and her plea of limitation against appellant’s claim of

legal title thereto, not having been put in issue, the judgment of the chancellor upholding her claim will not be reversed.

STRATTON & STEPHENSON for appellant.

CLINE & STEELE, S. M. CECIL and J. M. ROBERSON for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

In this action filed January 6, 1910, by Linnie McCoy against the heirs and surviving husband of Nancy A. Maynard, and J. P. Miller, the father of appellee, the title to about an acre and a half of land is involved, it being claimed by Linnie McCoy under title bond, alleged to have been executed to her by Nancy Maynard and her husband, T. J. Maynard, in 1884. A. J. Maynard, a son of Nancy Maynard, claims it by inheritance and under deeds from the other heirs of his mother. Appellee, Belle Miller Thompson, claims it under title bond from Nancy Maynard and her husband, T. J. Maynard, executed in 1884 to Greene McCoy, and several mesne conveyances; she also claims title by adverse possession in herself and those under whom she claims, since 1884, and in addition pleads and relies upon the fifteen year and three year statutes of limitation, estoppel and champerty. The judgment of the chancellor dismissed the claims of Linnie McCoy and the Maynards, and adjudged the title to appellee, Belle Miller Thompson.

Only A. J. Maynard has appealed, so we shall confine ourselves to the controversy between him and appellee.

Although appellant was a defendant from the beginning of the action, the first pleading filed by him was on October 17, 1914, and is styled "Amended Petition," in which he suggested the death of his co-defendant, J. P. Miller, and sought to revive the action against his heirs. In response to the summons on this "amended petition" appellee filed an answer, counterclaim and cross petition, the cross petition having been directed seemingly against only some new parties of whom she sought to recover on their warranties, in the event she was evicted, and not against her co-defendant, A. J. Maynard, now appellant; but as he styled his pleading by which she was brought into the controversy "amended petition" we shall treat her answer and counterclaim as an adverse pleading to appellant's claim, as it was manifestly intended and as it

was evidently treated by all parties in the court below. In that answer, counterclaim and cross petition, and a subsequent pleading which she styled "Reply of Belle Miller Thompson to the petition of A. J. Maynard, &c., to be made a party," although A. J. Maynard had not filed a petition to be made a party, but had been a defendant at all times, she set up her title from Nancy A. Maynard, through Greene McCoy, N. B. McCoy, J. E. Yost, J. P. Miller and the heirs of J. P. Miller, and in addition in separate paragraphs pleaded title by continuous adverse possession since 1884, the three years' statute of limitation, the fifteen year state of limitation and estoppel. Up until this time appellant had filed no pleading except his "amended petition," but thereafter on June 23, 1916, he filed an "answer" in which he simply stated that his mother died intestate in 1903, the owner of the tract of land in controversy; that at her death the land descended to her six children and two grandchildren, subject to the curtesy interest of T. J. Maynard, her surviving husband, and that since her death he had "become the owner of all the right, title and interest of his brothers and sisters in and to the tract of land described in the petition, subject to the curtesy interest of T. J. Maynard; that no other person known to this defendant owns any interest in said land, except the owner of the life interest or curtesy interest of T. J. Maynard." He did not deny the adverse possession of appellee, or those under whom she claims, or traverse her pleas of limitation and estoppel, nor in fact did he traverse any allegation of any pleading in the record, except in so far as his assertion of title in himself, controverts the assertion of title by the other claimants; nor did any other party to the action even attempt to put in issue appellee's claim of title by continuous adverse possession since 1884, or either of her affirmative pleas of limitation.

It is therefore apparent upon the pleadings only, appellee was entitled to the judgment rendered in her behalf, because of the thoroughly established rule thus stated in *Smith v. Cox's Committee*, 156 Ky. 118:

"When limitation is pleaded it is essential that if the plaintiff relied on any disability to avoid the running of the statute, this under the present Code must be pleaded; for it is new matter and otherwise the defendant would not be apprised that this objection to the running of the statute was relied on. The rule applies to married women no less than other persons laboring under disability."

See also *Turner v. Gill*, 105 Ky. 414; *Wren v. Ficklin*, 109 Ky. 472; *Goff v. Goff*, 182 Ky. 323.

Arguing the case solely upon its merits, counsel for appellant insist that as Mrs. Maynard did not convey the land to Greene McCoy, appellee's remote vendor, by deed, but executed only a bond for title in 1884, while she was under disability of coverture, and before the passage of the married woman's act in 1894, the bond for title was void, and she died the owner thereof; that as she was under disability of coverture until her death, the possession of those under whom appellee claims, was not adverse to her, and the statute of limitation did not begin to run against her. Although these propositions of law are true, yet they are not available to appellant, because of his failure to plead those facts which are new matter of avoidance of appellee's pleas of adverse possession and limitation. If, however, we might disregard appellant's failure to plead these matters of avoidance otherwise disclosed by the record, we might, we think, with equal consistency overlook the failure of appellee to plead the thirty year statute of limitation, which the record discloses was available to her, and a complete bar to appellant's claim of title which was first asserted in his answer filed June 23, 1916, more than thirty years after the beginning of the continuous adverse possession in 1884, of appellee and those under whom she claims; so whether we regard the pleadings only of appellant and appellee, or the merits of the case as disclosed from the record, the judgment of the chancellor is warranted.

Wherefore, the judgment is affirmed.

W. J. Sparks Company v. Cummins' Administrator.

(Decided February 4, 1919.)

Appeal from Rockcastle Circuit Court.

1. **Appeal and Error—Dismissal of Appeal With Damages—Practice.**
—Where the appellant prays an appeal and executes a supersedeas bond in the lower court, but fails to file a transcript of the record in the clerk's office of this court within the time allowed by the Code, the appellee may thereafter bring here a copy of the judgment, supersedeas bond and order of supersedeas, and have the appeal dismissed with damages.
2. **Appeal and Error—Supersedeas Bond—Presumption as to Issual of Supersedeas.**—When a supersedeas bond has been executed

in the lower court it will be presumed that an order of supersedeas issued, unless it is affirmatively shown that it did not.

3. **Appeal and Error—Damages on Supersedeas Bond.**—When a bond is executed and a supersedeas issued the right to damages on the bond in behalf of appellee accrues at once upon its execution and the issual of the supesedeas, and satisfaction of the judgment at any time thereafter does not defeat right to damages on bond.

C. C. WILLIAMS and L. W. BETHERUM for appellant.

SAM C. HARDIN for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE CARROLL ON
MOTION TO AWARD DAMAGES ON DISMISSAL OF APPEAL—
Sustaining.**

At the May term, 1918, of the Rockcastle circuit court, W. G. Cummins recovered a judgment against the W. J. Sparks Company for one thousand dollars. A motion for a new trial was overruled at the same term of the court and the W. J. Sparks Company prayed an appeal to this court which was granted.

On September 25, 1918, the W. J. Sparks Company executed in the court below a supersedeas bond on which we will presume, as there is no showing to the contrary, a supersedeas was issued staying the collection of the judgment pending the appeal. On this point it was said in *C. & O. Ry. Co. v. Kelly's Admr.*, 161 Ky. 660, that "Damages will not be awarded on the affirmance of a judgment unless the supersedeas bond is in the record and an order of supersedeas has issued, but when the bond has been executed, it will be presumed that an order of supersedeas issued unless it is affirmatively shown that it did not. *Whitehead v. Boorum*, 7 Bush, 399; *United States Fidelity & Guaranty Co. v. Boyd*, 29 Ky. L. R. 598."

On January 17, 1919, W. G. Cummins' administrator, as appellee, filed in this court, as he had the right to do, a copy of the judgment and supersedeas bond and has moved the court to dismiss with damages the appeal granted by the lower court, upon the ground that the transcript was not filed in the clerk's office of this court within the time allowed by section 738 of the Civil Code. *Langhorn, Johnson & Co. v. Wiley*, 120 Ky. 511.

It is admitted that the transcript of the record was not filed in this court by the appellant within the time allowed by the Code, but in response to the motion to dismiss the appeal with damages the W. J. Sparks Company shows by affidavits that on September 20, 1918, they paid to Cummins' administrator all the cost due by it in the Rockcastle circuit court and on September 24, 1918, paid to him the full amount of the judgment and interest. From these affidavits it would appear that the judgment was satisfied before the supersedeas bond was executed, but if this is so it is difficult to understand why the bond was executed, nor is any explanation of this curious fact offered.

On the other hand it appears from an affidavit filed for Cummins' administrator that the judgment was not satisfied on September 24th, or until September 30th—five days after the bond was executed. We do not, however, find it necessary to determine the question presented by deciding which of these irreconcilable affidavits should prevail. We will put both of them aside and look to other undisputed evidence in the record for a solution.

It appears as we have said that the supersedeas bond was executed on September 25th, and we also find that the attorney for Cummins' administrator, on September 30th, gave to W. J. Sparks Company a receipt acknowledging satisfaction of the judgment on that date. This receipt recites that: "Received of W. J. Sparks Company the sum of one thousand and twenty-one dollars (\$1,021.00), being the amount of the principal and interest of a judgment rendered in the above styled action on the 18th day of May, 1918. In accepting this receipt it is hereby understood that the plaintiff does not waive or release any right or claim he may have, if any, upon the supersedeas bond and the supersedeas herein in the Court of Appeals, nor does he release any claim for cost against the defendant in this action. It is supposed that the cost has been paid to the clerk of this court. This receipt is executed in duplicate, a carbon copy being retained by plaintiff's attorney. This September 30th, 1918."

From this it will be seen that the judgment was not in fact paid by W. J. Sparks Company until five days after the supersedeas bond had been executed. Under

these circumstances we think Cummins' administrator entitled to damages on the bond.

When a bond is executed and a supersedeas issued it prevents the judgment plaintiff from collecting his judgment and the right to damages on the bond accrues at once upon the execution of the bond and the issual of the supersedeas. It is not material how short or how long the obstruction may last, nor does the payment of the judgment at any time after the execution of the bond and the issual of the supersedeas defeat the right to damages unless it is so agreed. If the rule were otherwise the judgment defendant and appellant could execute the bond and keep the judgment plaintiff from collecting the judgment until he got ready to pay it without suffering any liability on the bond.

Aside from this an appellant can satisfy the judgment and still prosecute his appeal, and so if the contention of counsel for W. J. Sparks Company should obtain the appellant could execute a supersedeas bond and thereby stop the collection of the judgment until he got ready to satisfy it and then prosecute his appeal without incurring any liability for damages on the bond.

Wherefore the motion to dismiss the appeal with damages is sustained.

Bordes v. Leece.

(Decided February 4, 1919.)

Appeal from Rockcastle Circuit Court.

1. **Trespass—Action for Upon Land—Evidence.**—A party, who sues for trespasses upon his land, and his ownership is denied, must show, that he is the owner of the land, by some one of the ways, provided by law, for acquiring ownership of lands, before he can recover.
2. **Contracts—Parol Argeement Establishing Division Line—Estoppel.**—A parol agreement between the owners of adjoining lands, establishing a division line between their lands, will not be enforced as an estoppel, where the controversy arises from overlapping deeds, causing a dispute as to the superiority of title, and therefore a dispute as to true division line, and where the agreement was not executed, by acquiescence in and recognition of the agreed line for a considerable period of time, but, was repudi-

ated by one of the parties, within a few days, and before any intervening right occurred.

C. C. WILLIAMS for appellant.

BETHURUM & LEWIS for appellee.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

This controversy arises from the rival claims of the appellant, Julian Bordes, and the appellee, Alfred Leece, to the ownership of about one and one-half acres of land. The appellant owns a tract of land, containing 110 acres, and the appellee owns a tract, containing 35 acres. These tracts adjoin, and the disputed one and one-half acres lies upon one side or the other of the line, which divides their respective holdings. The deed, under which Bordes claims ownership of his land, describes the dividing line between his land and that of Leece, as a line "beginning at a stone, and running thence, N. 87° West, 104½ poles to a stone, in Jane Roberts' line." The stone in Jane Roberts' line, however, was placed there, but a few months, before the institution of this suit. The deed, under which Leece claims his lands, describes the dividing line between him and Bordes' lands, as beginning at a stone, near the angle of two fences, and thence running N. 88 W. 104½ poles to a stake, in Jane Roberts' line. The disputed land lies between a line beginning at the stone and running thence N. 88, W. 104½ poles to Roberts' line, and a line run from the stone N. 87½ W. 104½ poles to Jane Roberts' line. It is thus a triangular piece of ground, commencing at a point at the east end, 104½ poles, in length, and about seventy-five yards, in width, at the western end. Bordes alleging, that he was the owner and in the possession of the disputed land, claiming, that it was a portion of his tract, sought damages against Leece for trespassing upon it. Leece denied the ownership or possession by Bordes of the disputed lands; confesses to cutting timber trees, thereon; and claimed ownership and possession of it, and prayed, that, his title to it be quieted. Bordes replied, traversing all the claims of Leece, and plead, that before the institution of the suit, that he and Leece had made a parol agreement, establishing the dividing line between their respective lands, and that in ac-

cordance with said agreement that the land, in controversy, was embraced by the lands owned by him, and interposed the agreement as an estoppel of Leece to deny, that the lands were owned by him, or that Leece had any claim to them. Leece denied, that such agreement had been made. The lands owned by Bordes as well as those owned by Leece, were once, at the same time, owned by M. G. Wilmott. Hence, to enable Bordes to recover, it was necessary for him to show either a title deducible from Wilmott to him through conveyances and prior to the title of Leece from Wilmott, or else a title by adverse possession. If Bordes could show the necessary record title, it could be defeated by a title arising from adverse possession by Leece.

The parol proof shows, without contradiction, that Wilmott, in the year, 1852, sold the tract of land, now claimed by Leece, to one Johny Leece, who resided upon it until the year, 1880; that very soon after the sale to Johny Leece, Wilmott erected a line or division fence, between the lands retained by him, and those sold to Johny Leece. This fence extended from the stone corner, to Jane Roberts' line, about along the course of the line between those points, on a course of N. 88 W. from the stone to the Roberts line. From the stone toward the west, for a distance of two hundred yards, the land, contiguous to the fence upon Leece's side of the fence, was cleared and cultivated. Johny Leece's lands, lay on the north side of this fence, and he exercised dominion over the lands upon that side of the fence, and up to it, as long as he held the property, while Wilmott used and controlled the lands upon the south side and up to the fence. If the line between the lands was ever marked in any way, other than by the fence, there is no evidence of it. The fence was there as late as the year, 1880, and Wilmott, nor either of his successors until the appellant, Bordes, was ever known to have claimed, or attempted any act of ownership of the property, on the north side of the fence. The fence rotted down after, 1880, and for a number of years, there was practically, no fence existing, but, in 1902, Leece, the appellee, rebuilt the fence, but, slightly further toward the north, than the original fence. There is parol proof, that the line, in controversy, was run by surveyors, on two or three occasions, and that in surveying it, they ran practically, where the line from the

stone, N. 88 W. 104½ poles to Roberts' line is now claimed, at least, in running the line, the surveyor ran it upon the south side of the fence. The only written evidence of any of these surveys, is a survey, purporting to have been made of the Leece tract, in 1854. This survey describes the line, in controversy, as "beginning at a stake on a branch . . . , thence S. 82, W. 100 poles to a sower wood and a sweet gum . . ." There is evidence, that the end of this line on the Roberts line, was once, a sweet gum. This survey would indicate, that it did not embrace the lands, in controversy, but, the first call in it, is a mistake, as it describes the line from the stone, as running south instead of north.

The written evidence of title offered by Bordes, was:

(1) A deed from his brothers, who were co-heirs with him of his father, John B. Bordes. This deed was executed on the 21st day of April, 1911, and described the line, in controversy, as "beginning at a stone, corner to a 35 acre tract sold to John Leece, and formerly a corner to the lands of William Wilmott, thence with a line of said 35 acres, N. 87 W. 104½ poles to a stone in Jane Roberts' line." The deed recited, that John B. Bordes purchased the land from S. Noland.

(2) A deed from S. Noland, to John B. Bordes, executed on the 18th day of January, 1878, which recited, that the land conveyed, was a tract upon which M. G. Wilmott "lives" and which was sold under a judgment of the Rockcastle circuit court, on the 22nd day of June, 1863, and purchased by Noland and conveyed to him by the sheriff of the county, on the 20th day of August, 1870. The deed further recited, that Noland had attempted to convey the lands to Bordes, by a deed executed on January 26, 1871. This deed did not describe the lands, purported to be conveyed by metes nor bounds. courses nor distances.

(3) A deed from McClure, sheriff of Rockcastle county, to S. Noland, executed on August 26, 1870. This deed recited, that the land was sold under executions, issued upon judgments of the Rockcastle circuit court, against M. G. Wilmott, on June 22, 1863, and the equity of redemption therein, was sold on the 28th day of September, 1863, and S. Noland was the purchaser. The deed contained no description of the lands further, than, being the place where M. G. Wilmott "lives."

(4) A deed from M. G. Wilmott to B. R. Wilmott, executed March 5, 1875. This deed describes the line, in controversy, as "beginning at a stone . . . corner to 35 acres of land sold to Johnnty Leece and formerly a corner to W. M. Wilmott, thence with a line of said 35 acres N. 87 W. 102 $\frac{6}{10}$ poles to a stake in Jane Roberts' line."

(5) A judgment of the Rockcastle circuit court in favor of John B. Bordes against N. D. Wilmott, and the same plaintiff against R. B. Wilmott, and in which Bordes recovered a tract of land, of which the one now owned by the appellant, Bordes, is a part. The line, in controversy, was described in the judgment as "beginning at a stone, a corner of a 30 acre tract of land, now owned by J. K. McClary, thence with a line not yet established, N. 86 W. 104 poles to a stake in Jane Roberts' line." This judgment, as copied in the record, does not bear any date, but, presumably, was rendered in 1887, as it directed the sheriff to execute a writ of possession, for the lands on or before January 1, 1888.

The parol proof shows that the appellant, and those under whom he claims title, including his father and the Wilmotts, have been in the actual possession of the tract of land now owned by appellant, since, 1850, and it is to be presumed, claimed and had actual possession to the extent of the boundaries described, in their title papers, where not in the actual possession of some other. Neither the deed from Wilmot, by the sheriff, to Noland, nor the deed from Noland to John B. Bordes, from whom the appellant inherited his land, contains any evidence, that the lands conveyed, embraced the lands, in controversy. The deed from M. G. Wilmott to B. R. Wilmott, is not in appellant's chain of title, since the grantor, in that deed had lost his title to the lands, long before it was executed, and could only be evidence of the extent of the grantees' unlawful possession, up to the time, he was ousted by appellant's father, by the judgment of the court. Besides, when that deed was made and during the occupancy of the land by the grantee, the predecessors of the appellee, in title and occupancy, were in the actual possession of his land up to the line from the stone, N. 88 W. 104 $\frac{1}{2}$ poles to Roberts' line. As before stated, Johnnty Leece was in the actual possession of the land, in dispute, claiming, it as his own, up to the year,

1880, at which time, the fence was still standing upon the line, from the stone N. 88 W. $104\frac{1}{2}$ poles to Roberts' line, and in the year, 1880, a judgment of the circuit court, was rendered, in an action in which Johnnty Leece, was a party, directing a sale of the lands now owned by appellee, and in the judgment, the line, in controversy, was described, as "beginning at a stone . . . , at the angle of two fences, thence N. 88 W. $104\frac{1}{2}$ poles to a stake, with pointers, in Jane Roberts' line." The land was purchased at the sale under the judgment, by J. K. McClary, and conveyed to him, by a deed, which described the line, as in the judgment. McClary conveyed the land to Stapp and Stapp to Whipple, and Whipple to Reid, and Reid to appellee, and in each of the deeds, the line, in dispute, was described, as beginning at the stone, and thence, N. 88 W. $104\frac{1}{2}$ poles to Jane Roberts' line. Whether the 35 acre tract, when originally sold to Johnnty Leece, included the disputed land, or not, it seems, that the vendor and vendee made the line, as now claimed by appellee, by the erection and maintenance of the division fence between them. The proof fails to show any constructive or actual possession of the land, in dispute, by the appellant, or any of his predecessors, in title, while it does show an actual possession by Johnnty Leece, for nearly thirty years, and thereafter, his successors, in title, including appellee have held under deeds, which embraced the disputed territory. The title papers of appellant's predecessors, in title, fail to show, that they embraced the disputed land, but, with parol evidence, they do show, that the disputed land was embraced by the deeds from the sheriff to Noland, and by Noland to John B. Bordes, only, in the event, that it was not included in the sale to Johnnty Leece, by Wilmott, while all the evidence tends, strongly, to prove, that it was embraced in the tract, which was sold to Johnnty Leece. If the disputed land was not embraced by the title papers of Johnnty Leece, his title to it matured, by adverse possession, many years before he ceased to own the tract, and the description of his land, in the judgment under which it was sold, in 1880, embraced the land, in controversy, and the deed of each of his successors, in title embraced the land. While the fence rotted and did not exist for a period of time, the title to the disputed land had already matured, by adverse possession,

in Johny Leece, long before the fence rotted. The appellant, however, plead and now insists, that by reason of a certain parol agreement, entered into, as he alleges, between him and appellee, a few months before the institution of this action, the location of the line between their lands, was agreed upon and established, as beginning at the stone corner, thence a course, N. $87\frac{1}{2}$ W. to Jane Roberts' line, and that the land, in controversy, was upon the side of this line, upon which were the lands of appellant, and for this reason, the appellee was estopped to deny, that appellant was not the owner of the land or to claim ownership in himself. The appellee denies the making of such an agreement. That a parol agreement, establishing a division line between the owners of adjoining lands, under certain circumstances, which may surround parties and attended with certain conditions, will be valid and upheld, and will constitute an estoppel, when a party undertakes to claim the ownership of lands beyond the agreed line from him, or to deny the adjoining landowner's title to such lands, there can be no doubt. The result of such an agreement must not be the mere transfer of the lands owned by one party, to the other, as this is in contravention of the statute against frauds. The principle upon which such an agreement is upheld and enforced is, that the mere establishment of the true dividing line is not a sale or transfer of land by one party to another, and hence, not an agreement within the statute of frauds, requiring it to be in writing and signed by the parties to be bound, but, is an ascertainment and demarcation of the lands already owned by the parties, and is enforced, in the interest of putting an end to controversies. While the appellee denies, that he agreed to the establishment of the line, from the stone N. $87\frac{1}{2}$ W. 104 $\frac{1}{2}$ poles to Jane Roberts' line, as the dividing line between his lands and those of appellant, the evidence proves the facts, to be as follows: the parties were in a dispute as to the ownership of about three acres of land, which was embraced by the title deed of each—that is the land between a line, from the stone, N. 87 W. and a line from the stone N. 88 W. to Roberts' line. To determine the true dividing line between their lands, would make necessary the determination of which one of them owned the superior title. One or both of them secured the services of a surveyor,

who having, first, located the place of the stone corner, inquired of the parties, by the course, in which of their deeds, he should run the line from the stone to Roberts' line, and they agreed to submit that question to the decision of the surveyor, who announced that as one deed described the course to be N. 87 W. and the other described it, as N. 88 W. he would run it by neither of those courses, but, would run the line upon a course midway between them, which was N. 87½ W. and did so. As the surveyor proceeded, appellant or some of his friends, drove several stakes along the line, and placed marks upon certain bushes. When Jane Roberts' line was reached, the surveyor inquired, if the line was satisfactory to the parties, as run, and each of them signified his satisfaction, and the parties separated. Within two or three days, the appellee notified the appellant of his dissatisfaction with the line, as run and before, that it should be considered as permanent, that he desired to go to Mount Vernon, and to make an investigation of the records, there. Appellant assented to this request, but, urged appellee to make the investigation, as he desired to proceed, at once, to cutting the timber trees on the land. Appellee said, that he would do so, at the end of the following week. Before the expiration of that time, they were thrown together, again, and appellant again insisted, that he desired to cut the trees, at once, when appellee agreed for appellant to proceed to cut the timber trees, saying, according to appellant and others present, that he had made all the investigation, he desired to make, but, according to his own statement, that he was sick and unable to leave home, but, would make a further investigation, when he became physically able to do so. In the course of a few weeks, but after appellant had cut four or five trees, the appellee notified him, that he desired to have the line run by a certain other paper, and that, if that was not agreed to, that he would claim all the land, upon his side, up to the fence. Appellant refused to do any further surveying, and thereafter, appellee cut some of the trees upon the disputed land.

Whatever may be the rule which applies to the enforcement of a parol agreement, establishing a dividing line between adjoining land owners, when the exact location of the line is in doubt, and the subject of dispute between the owners, and where the evidences of the true

line are uncertain, and there is no question of superiority of title growing out of overlapping title papers, the same rule does not apply, as when, in establishing a dividing line, by parol, each of the parties gives up portions of his lands to the other, or where there are overlapping title papers, as patents and deeds, and the controversy is as to the superior title, and the true line depends upon the superior title. In the first instance, a parol agreement as to the dividing line is upheld, when the line has been agreed upon and plainly marked, as it is held, that such an agreement does not result in an exchange of any lands, and hence, is not within the statute of frauds. In the second instance, the line must be agreed upon, and the parties take actual possession up to the line, and continue the possession for a considerable time. In the last mentioned instance, the line must be agreed upon, and plainly marked, and acquiesced in and recognized by the parties as the true dividing line for a long or considerable period of time. It was formerly held, that the period of time, that a party should hold actual possession, or should acquiesce in and recognize the agreed line, as the dividing line, to make the agreement enforceable, or to constitute it a valid estoppel, was the same period, which is necessary to create a title, by adverse possession, but now, while the courts have never definitely fixed the period of time, of actual possession, or acquiescence and recognition, but, it is held in all cases, that the period of time, must be a long one, as distinguished from a short or temporary one. *Robinson v. Com.*, 2 Bibb 124; *Smith v. Stewart*, 13 Ky. Op. 705; *Campbell v. Combs*, 77 S. W. 923; 25 R. 1643; *Geohegan v. Turner*, 26 R. 537; *Frazer v. Mineral, etc. Co.*, 27 R. 815, 86 S. W. 983; *Ball v. Loughridge*, 30 R. 1123; *Cheatham v. Hicks*, 28 R. 66; *Caudill v. Bayes*, 28 R. 182; *Amburgy v. Burt & Brabb L. Co.*, 121 Ky. 580; *Blanton v. Howard*, 148 Ky. 551; *Conly v. Mayo*, 157 Ky. 450; *Alexander v. Parks*, 24 R. 2113; *Warden v. Addington*, 131 Ky. 296; *Orr v. Foote*, 10 B. M. 387; *Mosely v. Eversole*, 148 Ky. 657; *Young v. Woollett*, 16 R. 767; *Jamison v. Petit*, 6 Bush 670; *Thacker v. Crawford*, 5 R. 770; *Grigsby v. Combs*, 14 R. 652; *Duff v. Cornett*, 23 R. 297; *Loretta, etc. v. Clarissa Abel, etc.*, 13 Ky Op. 462; 9 Corpus Juris 234.

The instant case was one involving overlapping deeds. There was no question, as to where the line was, which

was described in either deed, but, the question was one of superiority of title and therefore, the true division line, and the parol agreement relied upon, if carried into effect, resulted in each of the parties giving up a portion of the lands, which were covered by his deed, and a transfer to one or the other of land, to which the other had a valid title. Under such circumstances, although it should be conceded, that all the other elements were present, which would make the parol agreement relied upon enforceable as an estoppel, the element of acquiescence in and recognition of the agreed line, for any considerable period of time, or doubtless for any period of time, was lacking, as appellee, if he agreed to the establishment of the line contended for, did not recognize or thereafter acquiesce in the line, but, repudiated it within a few days, and so notified appellant.

The judgment is therefore affirmed.

Perry, et al. v. Wilson.

(Decided February 4, 1919.)

Appeal from Harlan Circuit Court.

1. Deeds—Title—Delivery.—The title to real estate passes upon the execution and delivery of the deed.
2. Frauds, Statute of—Sufficiency of Description.—If the description in the deed or writing is sufficient to identify it, so that it can be designated by parol proof, and the words of description in the writing applied with certainty to the exact property, which the parties had in mind, when making the contract, the description is sufficient to meet the requirements of the statute of frauds.
3. Deeds—Extrinsic Parol Evidence.—Extrinsic parol evidence is not admissible to identify the property, which the parties had in mind, when making the contract, as the writing must identify it, but, such evidence is admissible to designate the property, which was identified in the minds of the parties, as expressed in the writing.
4. Adverse Possession—Champerly.—The adverse possession necessary to render a sale of a tract of land champertous, must be such an adverse possession as, if continued, would ripen into a title after the statutory period.
5. Champerty and Maintenance—Champertous Contracts in General.—The sale, by a co-tenant to another co-tenant, of his interest in

lands, which are claimed by them under the same title, is not champertous.

6. Dower—Devise in Lieu of Dower.—Where a husband devises property to his wife, it is presumed, that the devise is in lieu of dower, unless the will expressly shows a contrary intention, or the latter intention is necessarily inferable from the will.
7. Dower—Devise in Lieu of Dower.—Where a devise is made to the wife by the husband, in lieu of dower, the wife is barred from claiming dower, in the lands of the deceased husband, unless she within twelve months, renounces the provisions of the will in the manner provided by law.
8. Dower—Devise in Lieu of Dower—Failure to Renounce Will.—Where a widow fails to renounce the provisions of a deceased husband's will for her benefit, within the time provided by law, it is presumed, that she has elected to accept the provisions of the will, in lieu of dower and distributable share.
9. Dower—Law of the Place.—The title to real estate is governed, solely, by the law of the place, where it is situated, and the widow of an owner of real property, in this state, who resided in another state, is entitled to dower, in the lands in this state, solely, by virtue of the laws of this state, and her right to same must be measured by the conditions and restrictions, which the laws of this state, impose upon the right to dower.

ZEB A. STEWART and KEITH B. WISE for appellants.

J. S. FORRESTER for appellee.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

The widow and children of Aaron H. Helton, deceased, instituted this action, in the Harlan circuit court, against the appellee, E. M. Wilson, and sought the sale of a large tract of land, containing above six hundred acres, and the division of the proceeds among the owners of the land. The children of Aaron H. Helton claimed, that they were the joint owners of an undivided one-fifth part of the land, by inheritance from their father, and the widow claimed, that she was the owner of a dower, in the portion, owned by the children. The defendant, Wilson, was admitted to be the owner of an undivided four-fifths of the land. The land was unimproved, and the sale was sought upon the ground, that it was indivisible, without material impairment of its value. Wilson denied the ownership of any part of the land, or any interest in it, by the plaintiffs, and claimed ownership of the entire tract. The court adjudged, that Wilson was the owner of all the interests, in the land, and that the peti-

tion of the plaintiffs, be dismissed, and from that judgment, they have appealed.

The title to the land was granted to Robert H. Helton, by a patent to him, from the Commonwealth of Kentucky, in the year, 1846. He died, intestate in the year, 1883 or 1884, and left, as his only heirs, Aaron H. Helton, the husband of Sarah Helton Perry, and father of the other plaintiffs; and two other sons and two daughters: James I. Helton, Alexander Helton, Milly Melton and Patience Brock. The plaintiffs claimed, that Aaron H. Helton died in the year, 1910, the owner of the interest in the land, which he inherited from his father, Robert H. Helton, and that they inherited the ownership of the interest, from him. The defendant, Wilson, claimed ownership of the lands, by conveyances made by James I. Helton, Alexander Helton, Milly Melton and Patience Brock, and through mesne conveyances from their vendees to him, and these conveyances are undisputed. He, also, made claim, that on the 28th day of August, 1888, Aaron H. Helton conveyed the interest in the land, which he inherited from his father, Robert Helton, to his brothers, James I. Helton and Alexander Helton, and that the conveyances, thereafter made by them, included the interest, which they received by the conveyance from Aaron H. Helton. The plaintiffs denied, that Aaron H. Helton ever conveyed his interest in the land to his brothers, and that if he did execute the deed relied upon, that it was void, because of its uncertainty, as to the land, which was attempted to be conveyed by it, and, further, was a champertous transaction and therefore void, and for these reasons, the title of their father did not pass by reason of it. Hence, the title, of the children of Aaron H. Helton, to one-fifth part of the land, is dependent upon whether he executed the deed of conveyance to his brothers, and if he attempted to do so, did the deed contain a description of the land, of such certainty, as to pass the title, and, further, was the transaction champertous?

(a) Contentions are made to the effect, that the deed exhibited, as the evidence of the sale and conveyance, by Aaron H. Helton, to his brothers, James I. and Alexander Helton, of his undivided interest in the land, was defectively certified as to his acknowledgment of the deed; that the certificate of acknowledgment was not signed properly by the officer, before whom, it purport-

ed to have been acknowledged, and that the signature to the certificate, thereafter made by the county court clerk of Leslie county, was invalid, as at the time, he was without authority to so sign it; that it was not a recordable instrument, because of the defective certification of the acknowledgment, and hence, a copy of it, made from the records of the county court clerk's office, was not competent evidence of the existence or execution of such a deed. It is unnecessary to discuss or pass upon these contentions, as the original deed was exhibited in the evidence; it purports to be the evidence of an executed contract; and its execution and delivery, by Aaron H. Helton, at the time it bears date, was proven by the testimony of the deputy of the county court clerk, and another, who was present, and their testimony is not contradicted by any witness or circumstance. Independent of any certification, the deed was proven to have been delivered by the grantor, on the day it bears date, and to have been recorded in the office of the clerk of the Harlan county court, thereafter, on the 12th day of March, 1901, and to have been in the custody of one of the heirs of Alexander Helton, as late, as the year, 1916. The evidence, without contradiction, is to the effect, that Aaron H. Helton, who resided in the state of Kansas, was, at the time the deed was executed, on the 28th day of August, 1887, in Leslie county, Ky., upon a visit to his relatives, and that at the home of James I. Helton, in that county, and on that occasion, two other deeds were prepared and executed, by one of which the heirs of Robert H. Helton, including Aaron H. Helton, conveyed to the heirs of a deceased brother of their father, a tract of land, the title to which was in their father, at his death, and by the other deed, the heirs of Robert H. Helton, excepting Aaron H. Helton, conveyed to their brother, Alexander Helton, a tract of land, which their father owned at his death. Aaron H. Helton, though present, did not join in this deed, for the reason, it is to be inferred, that on the same occasion, he executed the deed, in controversy, by which he conveyed to Alexander Helton and James I. Helton, the interests, which he had inherited from his father, in all the lands, which were owned by his father, at his death, and James I. Helton, joining in the deed with the other heirs to Alexander, made the title of Alexander complete in the tract of land conveyed to him. The testimony to the

effect, that the deed, in controversy, was executed by Aaron H. Helton, at the time and place it purports to be, is greatly corroborated, by the certificates of acknowledgment, which the deputy clerk endorsed upon the other two deeds. They are similar in character as to the words and manner of signature, to the endorsement, which the deputy proves, that he placed upon the deed, in controversy. The words and style of signature seem to have been peculiar to the deputy. He, beyond question, was very unskillful, and among other things, the certificates of acknowledgment to the other deeds, and his signature to each are made in a similar way. Ten years afterwards, when his vendees, and their sisters, and another, who had acquired some interest in the land, joined in a suit against certain parties for trespassing upon the land, and after a protracted litigation, recovered a judgment for \$1,000.00, in damages, Aaron H. Helton, although well known, in that community, as it may be inferred, as a son of Robert H. Helton, through whom the plaintiffs claimed title, was not made a party to that suit. During its pendency, he made a visit to Harlan county, and following the visit, gave a deposition for the plaintiffs, on the 4th day of November, 1899, in which it plainly appears, that he knew, who were the plaintiffs, and that he was acquainted with the land, that was in litigation. He did not make any claim, at that time, nor thereafter to any interest in the land, nor in the judgment, although he testified to his knowledge of his father's ownership of the land, at the time of his death. Hence, it is concluded, that Aaron H. Helton executed and delivered the deed, as claimed by the appellee, and the plaintiffs are neither creditors nor purchasers.

(b) The contention, that the deed does not contain a description of the lands, sufficiently certain, to pass the title under the statute of frauds, and that the deed is therefore void, we do not think is tenable. The deed recites that in consideration of the sum of \$150.00 in hand paid, the grantor has bargained and sold unto the grantees all of the grantor's interest, in the real estate of his father, R. H. Helton, deceased, and covenants to warrant and defend the title to the interest conveyed against the claims of himself and heirs. Aaron H. Helton and "his heirs" are named as the vendors, and James I. and

Alexander Helton, as the vendees. Of course, the heirs of Aaron H. Helton then had no interest in the land to convey, and he was the only party in interest, and the addition of his heirs as vendors, with him, could have no effect upon the interest conveyed by him, and seems to have been added by the unskillfulness of the draughtsman, without any real meaning. In such a transaction, a writing signed by the vendor alone, if otherwise sufficient, is adequate, under the statute of frauds. *Posey v. Kimsey*, 146 Ky. 205; *Fugate v. Hansford*, 3 Litt. 262; *Tyler v. Onzts*, 93 Ky. 331; *Henderson v. Perkins*, 94 Ky. 207; *Armstrong v. Lyen*, 148 Ky. 59, and many others. It is insisted, that a deed is void, because of uncertainty, when it does not contain a statement of the county and state, in which the lands, intended to be conveyed, are situated, and there are authorities, which support this contention, but, in this jurisdiction, such a rule has not been adhered to. *Bates v. Harris*, 144 Ky. 399. The rule prevailing in this jurisdiction is, that if the description of the property, in the deed or writing is sufficient to identify it, so that it can be designated by parol proof, and the words of description in the writing applied with certainty to the exact property, which the parties had in mind, when making the contract, the description is sufficient under the statute of frauds. Extrinsic evidence is not admissible to identify the property, which the parties had in mind, when making the contract, as the writing must identify it, when read in the light of the facts, but, the extrinsic parol evidence is admissible to designate the property, which has been identified in the minds of the parties, as expressed in the writing. *Matherly v. Wright*, 171 Ky. 264; *Bates v. Harris*, *supra*; *Hanly v. Blackford*, 1 Dana 2; *Henderson v. Perkins*, *supra*; *Tyler v. Onzts*, 93 Ky. 331; *Posey v. Kimsey*, 146 Ky. 205; *Hall v. Cotton*, 167 Ky. 467; *Campbell v. Preece*, 133 Ky. 572; *Brice v. Hays*, 144 Ky. 535; *Hyden v. Perkins*, 119 Ky. 188; *Moayon v. Moayon*, 114 Ky. 855; *Ellis v. Deadman's Heirs*, 4 Bibb, 466. The language of the deed, in controversy, identifies the property, which is the subject matter of the contract, evidenced, by the deed as the interest which the grantor inherited in the lands, owned by his father, R. H. Helton, at the time of his death. Without, further identification, than is expressed by the language of the deed, the description

given in the deed can be applied with certainty, to the property, in controversy, and for such may be designated and pointed out, as the property which the deed identifies as the subject of the contract. When by parol proof, the lands, which were owned by R. H. Helton, at the time of his death, are designated and pointed out, there seems to be no basis for the contention, that there is any uncertainty as to the property embraced by the deed, or as to that which the parties had in mind, in the execution and acceptance of the deed. Though proof of the fact, that Aaron H. Helton had knowledge of the ownership of the lands by his father, at the time of his death, can not be called to assist the identification expressed by the deed, yet the proof shows, clearly, that he had such knowledge at the time of the execution of the deed.

(c) The plea that the deed, in controversy, was champertous, will not avail the appellants anything, for two reasons. (1) There is no evidence in the record, which proves, that the lands were in the adverse possession of another, at the time, the deed was executed. The adverse possession which must exist to make a conveyance of lands champertous, must be, in all cases, such a possession, as if continued for the statutory period, will ripen into a title in the possessor. (2) The purpose of the statute, which makes champertous the sale of real estate, which is held in adverse possession, is to discourage litigation, by prohibiting one, who has a doubtful title, and who is not willing to sue upon his title, from selling it to another, and thus encourage strife. Where co-tenants claim under the same title, a sale by one of his interest in the land to the other, does not introduce any stranger to the title, and the reason for the statute fails. He sells to one, who already has a right to sue and to base his action upon the same title. Aaron H. Helton and the vendee in the deed, were co-tenants. *Russell v. Doyle*, 84 Ky. 386; *Cummins v. Latham*, 4 T. B. M. 97; *Speer v. Duff*, 23 K. L. R. 1323; *Blackerby v. Holton*, 5 Dana, 520.

(d) The proof, without contradiction, however, shows, that the appellant, Sarah Helton Perry, was the wife of Aaron H. Helton, at the time, he executed the deed, by which he conveyed his interest in the lands to his brothers. She became his wife, in the year, 1881, and was therefore his wife, at the time, the interest in the lands, in controversy, was sold and conveyed by her hus-

band. She did not join in the deed, by which the husband conveyed his interest in the land, and the question arises, as to whether the trial court should have denied her, a dower in the interest in the land, to which he held title during her coverture. The statute, 2132, Ky. Stats., provides, that after the death of the husband the wife shall have an estate for her life in one-third of all the real estate, of which he, or any one for his use, was seized of an estate in fee simple during the coverture, unless she has forfeited or relinquished the right, or the right to recover it has been barred. It appears, from the record that the husband, in the instant case, died testate, and by his will he devised all of his personal estate to the wife, and a life estate in a farm, which he owned in Oklahoma, and the wife was, also, made the executor of the will, and accepted the provisions of same, by executing the will according to its terms. The lands, in controversy, were not mentioned, in the will, and if owned by the testator, at the time of his death, would have passed, as undevise estate. Section 2132, *supra*, must be read and construed in connection with section 1404, Ky. Stat. The latter section has been, consistently, construed by this court, to provide, that if a husband makes a provision for his wife, by devising property to her, and she fails, within twelve months, after the probate of the will, to renounce the provisions of the will made for her benefit, she is barred from claiming dower, in the lands of the deceased husband, unless it affirmatively appears from the will, or it is necessarily inferable from it, that it was not the intention of the husband, to give the wife, the property devised to her, by the will, in lieu of dower. *Bayes, etc. v. Howes, etc.*, 113 Ky. 265; *Huhlien v. Huhlien*, 87 Ky. 250; *Smithers v. Smithers' Exr.*, 9 Bush 233; *Smith v. Perkins*, 148 Ky. 387; *Grider v. Eubank*, 12 Bush, 510; *Mercer v. Smith*, 107 S. W. 1196; *Smith v. Boone*, 7 Bush, 367; *Voss v. Storts*, 177 Ky. 541. The common law rule, which prevailed before the adoption of section 1404, *supra*, was different, and yet applies to a husband, who claims courtesy, in a deceased wife's lands. *Voss v. Storts*, *supra*. The failure by the wife to renounce the provisions of the will for her benefit, is an election by her, to accept the provisions of the will, and where the will does not affirmatively declare, or if it is not necessarily inferable from the will, that the tes-

tator intended, that she should have dower, in addition to the benefits under the will, the presumption is conclusive, under the statute, that the devise was in lieu of dower, and being in lieu of dower, it bars the right to recover dower, in lands, which the husband had sold, in his lifetime, and in the conveyance of which the wife did not join. *Grider v. Eubank, etc., supra*. The will of Aaron H. Helton does not, in terms, provide, that the devises made to his wife, shall not be in lieu of dower and distributable share, nor is such intention necessarily inferable from the will. It is true, the will was made by a testator, domiciled in the state of Oklahoma, and it might be insisted, that section 1404, *supra*, had no reference to a foreign will, but, only to domestic ones, and that the intentions of such a testator should be determined by the law of his domicile, and no doubt, as a general rule, this is correct, but, it is certainly incontestable, that the title to real estate, is governed by the law of the place where it is situated, and solely by such law. It is only by virtue of the laws of this state, that a widow of an owner of land in this state, who dies a citizen and resident of another state, is entitled to dower in such lands, and under such circumstances, she should only have dower in lands, situated in this state, under the terms and conditions prescribed by the laws of this state.

The judgment is therefore affirmed.

Commonwealth, By etc. v. Kottmyer.

(Decided February 4, 1919.)

Appeal from Boone Circuit Court.

Taxation—How Value of Franchise Ascertained.—In a proceeding under section 4082 Kentucky Statutes, by a revenue agent, to recover taxes due upon a franchise owned and held by an individual and operated between two states, the proper method to ascertain the value of the franchise is to capitalize the net earnings of the business wherein the franchise is exercised, and from the sum thus ascertained deduct the assessed value of the tangible property, and if there be no net income after deducting the cost of the operation from the gross income, no franchise tax is recoverable.

S. W. TOLIN for appellants.

O. M. ROGERS and JOEL C. CLORE for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Kottmyer owns a small steam ferry boat, a gasoline boat and some other small boats, which he uses in operating a ferry on the Ohio river between Constance, Boone county, Kentucky, and a certain point in the State of Ohio. He has and had at all the times complained of, an exclusive franchise for the operation of a ferry at that point. To the ferry property belongs about nine acres of land at Constance. On this land are situated two or more residences and some other buildings used in connection with the ferry.

This action was instituted by a revenue agent in the name of the Commonwealth to recover of Kottmyer a franchise tax upon the ferry for the years 1912, 1913, 1914, 1915 and 1916. The tangible property belonging to Kottmyer and used in connection with the ferry, was listed for the years 1912 and 1913 at \$3,000, for each of said years; for the year 1914, at \$20,080; for the year 1915, at \$15,600; for the year 1916, at \$15,600. The average gross earnings of the ferry were \$5,800 per year. This action proceeds upon the ground that the difference between the earning capacity of the property, which has a fixed value in this case—\$5,800—and the necessary operating expenses, is the true basis upon which to capitalize the value of the franchise, computing the interest at six per cent and then deducting the assessed value of the tangible property from the sum so realized from this capitalized value.

The appellee, Kottmyer, contends that in fixing the value of the franchise for the purpose of taxation for each of these years, the gross amount expended for operating the ferry should be deducted from the gross income of the ferry, and the difference, if any, capitalized at six per cent. in the manner set forth above, to find the value of the franchise. According to Kottmyer, his operating expenses, including repairs, oil, ropes, coal, gasoline, repair of wharves and labor, amount to \$4,336.00, exclusive of his time, upon an average annually for the years named. This, however, is disputed by the revenue agent. The items of expense in operating are set forth by Kottmyer with precision, while the Commonwealth undertakes to show that the expenses of operation claimed by Kottmyer are exaggerated—padded—by in-

roducing a witness or two who had connection with other boats operated under somewhat similar circumstances. Since it is admitted by the Commonwealth that the difference between the earning capacity of the property and the necessary operating expenses, is the true basis upon which to capitalize the value of the franchise for taxation purposes, it was very largely a question of fact which the courts below determined. That is to say, that the county court, as well as the circuit court, had before it the question of the amount of necessary operating expenses of the ferry, the fair cash value of the tangible property, and the gross and net earnings of the ferry for the several years named. The county court determined that the gross earnings of the ferry were not in excess of the necessary operating expenses thereof, for the years named, and dismissed appellants' petition. The Commonwealth prosecuted an appeal to the circuit court, where a like finding of fact was made, and judgment entered accordingly. From that judgment the Commonwealth appeals to this court.

Henry Kottmyer is a licensed pilot and steamboat operator. As such he acts as pilot and captain of his boats, and devotes his entire time to the work; his services are valuable and saves the necessity of employing another skilled man at a fixed cash outlay; the boats run both night and day. In the business of operating the boats and handling the freight Kottmyer employs three other persons; an engineer for the boat at \$100.00 per month, or \$1,200.00 per year; two freight handlers and helpers at \$9.00 per week each, or \$936.00 per year, thus expending a total of \$2,136.00 per year for help. It is shown that the repairs for the boats and wharves, and the oil, coal, &c., amount to \$2,200.00 per year, making a total of \$4,336.00, actual expenses, not allowing anything for the services of Kottmyer, who devotes his entire time to the business and is actually engaged as pilot in running the boats. This sum, \$4,336.00, deducted from the gross income of the business, \$5,800.00, leaves \$1,464.00, as salary or wages for Kottmyer in the conduct of the business. Several witnesses testified that said amount is no more than he is reasonably entitled to receive for the nature and character of services performed. Thus estimated, there would be no difference between the gross income and the necessary expenses

of operation and, therefore, nothing to capitalize on a six per cent basis to ascertain and fix the value of the franchise. The facts were found by both the county court and the circuit court to be as set forth above, and we see no reason why this court should make a different finding of fact.

Judgment affirmed.

Sizemore, et al. v. Davidson, et al.

(Decided February 4, 1919.)

Appeal from Leslie Circuit Court.

1. **Frauds, Statute of—Parol Contract for Purchase of Land.**—A parol or verbal sale or purchase of land is void and confers upon the purchaser no legal or equitable interest whatever in the land, but only such collateral equities as may arise out of the transaction such as a lien on the land for the purchase money paid, if the possession has been transferred pursuant to the verbal purchase. A parol contract for the purchase of land is unenforceable.
2. **Adverse Possession—Limitation of Actions.**—One who has or claims an interest in land adverse to another in possession thereof, must assert it within the statutory period, and if he fails, his right, whatever it may be, will be barred; and in no case will more than thirty years be allowed for the bringing of such action.

JOHN M. MUNCY and JOHN L. DIXON for appellants.

LEWIS & LEWIS for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

About 1860 Russell Sizemore purchased by parol a tract of land, then in Clay county but now in Leslie county, containing about seventy-five acres, from H. L. Napier; and Sizemore, his wife and three children immediately moved on the tract of land and took possession of it. While Sizemore paid Napier \$75.00, one-half of the consideration for the land, there was no writing whatever evidencing the trade. Shortly after Sizemore and his family went upon the tract of land he entered the Federal army, and some time thereafter died in the

service, without ever having returned home. His family were residing on said farm at the time of his death. When the balance of the purchase money became due Mrs. Sizemore was unable to pay it, and she and Napier entered into an arrangement whereby Napier returned to her a part of the money paid by her husband, and she relinquished her claim and surrendered possession of the land to Napier. This was done about 1864. Napier took possession of the land, and in 1868 caused a survey to be made of the boundary for the purpose of appropriating the same as vacant land. Up to that time no survey had been made or patent issued by the Commonwealth for the land; in fact Napier had no title whatever to the land other than his claim as occupant at the time he sold it to Russell Sizemore in 1860. A patent was issued to Napier for the land in 1869, and shortly thereafter he sold it to one Couch and Couch sold it to another man by the name of Couch, and he in turn to another man by the same name, and the last named sold it to appellee, John Davidson. As no deed had been made by Napier, by agreement of the parties, Napier in 1880 executed a deed direct to John Davidson for a part of the land in controversy. The balance of the land was purchased by Davidson from D. K. Rawlings and wife at a later date, and is not seriously claimed by appellants in this controversy. John Davidson married the widow of Russell Sizemore some years before the land was conveyed to Davidson, but they had not lived upon the land in controversy. In fact the widow purchased a small piece of land from her father, Eli Couch, and moved with her family to this tract, and continued to live there some fourteen or fifteen years, the widow marrying John Davidson in the meantime. Shortly after the purchase by Davidson he and the widow and three children moved upon the place, and Davidson and his wife have continued to reside thereon ever since, but the children having become grown, have other homes. This action was commenced by the three Sizemore children against John Davidson and their mother to recover the tract of land mentioned, upon the grounds (1) that they are entitled to the land because their father, Russell Sizemore, made a parol purchase thereof from Napier; (2) they should recover the land because appellee, Davidson, knew the fact that Russell

Sizemore had purchased said land from Napier and had paid him \$75.00 thereon, and had moved upon said land, and his family lived thereon at the time of the death of Sizemore, and the deed which Davidson took from Napier, knowing these facts, invested him with the legal title as trustee for the use and benefit of the appellants; and (3) whatever was paid by Davidson, as consideration for the land to Napier, was the money and property of appellants as the heirs of Russell Sizemore, and they having provided the money, a trust resulted in their favor when the title was taken in the name of Davidson. The chancellor entered a decree dismissing appellants' petition, and they prosecute this appeal.

The first and second contentions of appellants may be considered together:

(1-2) It is admitted that Napier had no legal title to the land at the time he sold it by parol to Sizemore in 1860. It is also admitted that there was no writing signed by the party to be charged and exchanged between the parties with respect to said sale and conveyance. As Napier had no title in 1860, he could convey none, and Sizemore was not, therefore, invested with title to the land. It is urged, however, that the title which Napier acquired in 1869, by grant from the Commonwealth, inured to the benefit of his grantee, and this is the general rule, but does not fit the facts of this case. If Sizemore or his widow and family had remained in possession of the tract of land, claiming it under the parol purchase, and had satisfied the purchase money claim of Napier, Napier would have been powerless, without first adjusting their equities, to eject them from the land even though they held no paper title from him, and his title acquired from the Commonwealth would have become their title; but having abandoned the premises and taken up their abode elsewhere, the parol contract between Russell Sizemore and Napier respecting the land was not enforceable. Sec. 470 Kentucky Statutes; *Usher v. Flood*, 83 Ky. 552; *Asher v. Brock*, 95 Ky. 272; *Elliott v. Walker*, 145 Ky. 73; *Coffey v. Humble*, 154 Ky. 710; *Grace v. Gholson*, 159 Ky. 362; *Beckett-Isemon Oil Co. v. Backer*, 165 Ky. 320; *Padgett v. Decker*, 145 Ky. 227. When the widow voluntarily surrendered possession of the tract to Napier and moved away from the place, there was no right in her or in the

children to the land which the law recognizes. Had she remained on the land she might have successfully resisted any claim of Napier to the property, undoubtedly so until the equities were adjusted.

(3) Appellants insist that Davidson paid for the land with property belonging to their father's estate and to them as his heirs. Davidson says that he paid the purchase price with his own property and money independent of anything which came from the Sizemore estate or appellants. Upon this subject Davidson testified: "Q. How long have you lived on this land? A. I have lived there it will be 36 years in November. The deed was made there in October and I moved there on the 22nd of November, 1880. Q. State whether or not you have ever lived at any other place since you moved there? A. No, I have never lived any other place. Q. What have you used this land for during all the time that you have lived on it? A. I have used it for farming purposes and have taken the timber off it, that is a part of the timber, and there has never been any disturbance about it, everything was quiet and peaceable. Q. State whether or not the plaintiffs or any other person have ever claimed this land since you moved onto it? A. I never heard anybody claim it until about three or four years ago. Q. What patent covers this land that is in controversy? A. Patent in the name of H. L. Napier. Q. Under what patents do you claim the land embraced in this deed? A. I claim it under the H. L. Napier patent and a patent in the name of John Couch. Q. From whom did Bill Couch buy this H. L. Napier patent? A. He bought it from Carr Couch and Carr bought it from John Couch, and John Couch bought it from H. L. Napier. After I bought this land and paid for it we all got together, me and John Couch, Carr Couch and Bill Couch, and we held a counsel over it, about how we would have the deeds made; there hadn't been any deeds made, and we all agreed to save expense—for Hugh Napier to make the deed to me, instead of making deeds all down through the Couches and then them making the deed to me. And H. L. Napier did make me the deed referred to and which will be filed. At the time we all agreed that the deed should be made to me, John Couch give me a bond or some sort of writing authorizing H. L. Napier to make the deed to me and when I give him that writing he made

me the deed. Q. State whether or not it was the understanding between you and the Couches and H. L. Napier that you were buying and getting a deed for all the land that was covered by the H. L. Napier patent? A. No, sir, I wasn't getting it all. I was getting it from the two poplars mentioned in the deed and from there up on both sides of the branch to the graveyard, except about a quarter of an acre around the graves. I was getting all the land in the H. L. Napier survey except from the poplars down; from there up I got it all except from the poplars down; from there up I got it all except that around the graves. From the poplars down Napier had sold to John Couch and he had sold it to D. Y. Lyttle and he gave it to his daughter, Mrs. Rawlings, and she and her husband, D. K. Rawlings, deeded it to me. Q. State whether or not John Couch ever made David Y. Lyttle a deed to the land below the poplars down, spoken of? A. He made it from the poplars down along the whole boundary that he owned down there himself. Q. Tell the court who paid for the land that H. L. Napier conveyed to you? A. I paid William Couch. Q. In what did you pay him? A. I paid him a filly that I got from Bige Sizemore as the first payment, and the second was a cow that I bought from Judge Alex. Begley. I traded him bee gums for the cow. The third payment I sold a horse to George Steele for \$50.00 in school claim and he give me an order to Bill Hall, who was school commissioner, and I sold the school claim to Capt. Eversole and I sold Bill Couch \$35.00 in the store, and that was the last payment on the land. Q. Whom did you pay for the land you got from Rawlings? A. I paid Dan Rawlings; I let him have a yoke of big cattle for the land. Q. How did you pay Bige Davidson for the young filly you let Bill Couch have? A. Me and my wife had bought a piece of land from her father, Eli Couch, before that time, and Bige Davidson said if I would not have my name in the deed that Eli Couch was to make he would let me have the filly, as I had raised her and give her to him, he would let me have her back. I went and fetched the clerk to my house and he stayed all night and the next morning I went over to Eli Couch and got him and his old woman to come over to my house and make the deed to my wife and three children. After that time, Taylor Sizemore and Sis North and Bige Sizemore and

Taylor Sizemore finally got all the Levi Couch land, and after that time he sold it to Captain Eversole, and Eversole sold it to some land company. Q. Which three children did you direct Eli Couch to make the deed to? A. Taylor Sizemore, Bige Sizemore and Haley Sizemore; now she is Sis North. Q. Were these three children the only children of your wife, by her first husband? A. They are the only ones I ever seen or heard of. Q. State whether or not you ever paid any money or property that belonged to any of the plaintiffs for this land? A. I did not. Every copper come through me. I never paid any money in it all. I paid for it as I have told you before. Q. State whether or not you ever at any time since you have bought this land got a deed for it; you ever held out to the plaintiffs, or told them that their money and property had paid for the land and that the land belonged to them and that you were going to deed and convey it to them? A. I never said that to them nor anybody else. Q. State whether or not you ever at any time told the plaintiffs or indicated to them in any way that the land belonged to them, or that you and your wife only had a life estate in the land? A. I never did."

The appellants were very young at the time Davidson purchased the land and are unable to give evidence with respect to the transaction or the payment of the purchase price, except hearsay. At the time Taylor Sizemore gave his deposition he was 54 years of age, and Mahala, now called Sis North, was 53 years old. They undertook to relate many circumstances which had been told them by older people, and some statements which they attributed to their mother and to Mr. Davidson. For instance, they say that their mother and Mr. Davidson frequently told appellants they only claimed a life interest in the land and that the fee in the land belonged to appellants. This, however, is emphatically denied by both Mr. Davidson and the mother of appellants. Davidson also testifies that he paid a certain cow on the price of the land and that this cow was his own property which he had acquired from a man by the name of Begley. He also explains in detail how the balance of the purchase money was paid, and without equivocation. From the evidence we are persuaded that while appellants are claiming in good faith, they are relying chiefly

upon hearsay and are wholly without knowledge of the real facts of the controversy, because they were not old enough to know the facts with relation to the land transactions in 1860 up to 1880. On the other hand Mr. Davidson and his wife tell the facts in detail. We are convinced that Davidson provided the money with which to pay for the land and not the appellants. At any rate he purchased it in 1880 and moved on it some thirty-four years before the institution of this action. At that time some of the appellants were almost grown, and the youngest one must have been at least seventeen or eighteen years of age. Thus calculated, all the appellants had attained their majority more than thirty years before the commencement of this action. Their claim was, therefore, stale at the time they undertook to assert it. It was their duty, after having attained their majority, to declare their right to the land, and if it was denied, to have enforced it in a court without unreasonable delay. This they failed to do, and having slept on their rights for more than thirty years, they will not now be heard to claim the land to which their right in the first instance was very doubtful.

Judgment is affirmed.

Kelly v. Kelly.

(Decided February 4, 1919.)

Appeal from Boyd Circuit Court.

1. **Husband and Wife—Alimony.**—If a husband abandons his wife without a legal reason for so doing, he may be required to pay alimony.
2. **Husband and Wife—Abandonment.**—Mere fits of ill temper and occasional quarreling and scoldings by the wife, will not justify a husband in abandoning his wife, unless his personal safety is endangered.
3. **Husband and Wife—Alimony.**—A wife will not be denied alimony, where she is not guilty of any moral delinquency, and her husband has abandoned her, although she is not entirely blameless, if the husband was a participant in the causes of the shortcomings, which led to the separation.
4. **Husband and Wife—Alimony—Discretion of Chancellor.**—The amount of permanent alimony to be allowed a wife, because of desertion by her husband, is confided to the sound discretion of

the chancellor, who may take into consideration, the amount of the husband's estate, his present and future prospects, his earnings and ability to earn money; his dependents, in the way of children, and the particular cause of the separation.

B. O. BECKER, GEO. B. MARTIN and JOHN L. SMITH for appellant.

JOHN F. HAGER and JOHN W. WOODS for appellee.

OPINION OF THE COURT BY JUDGE HURT—Affirming upon appeal, and reversing upon cross-appeal, in part.

The parties to this action were reared in the city of Ironton, Ohio, where they were married, on June 12, 1900. The husband, having employment, in Ashland, Ky., they removed to that city to live, where in the month of March, 1903, twin children were born to them. These children are boys, and are now fifteen years of age, and have been, since they were ten years of age, attendants at a military school, near Cincinnati, Ohio, except during the usual vacations, at such schools. When the parties were first married, they resided, for some time, in a home, which was owned by the husband's mother, in Ironton, and after they came to Ashland, the mother of the husband sold the house and gave him the proceeds, in the way of assisting in the purchase of a dwelling house, in Ashland, and afterwards, gave him two thousand dollars, with which to purchase additional ground near the house, and purchased and lived in a home adjoining the home of appellant and appellee. The father of the husband died, a year or two before he and his wife separated and the husband received a considerable amount of property, under the will of his father.

The residence was in a neighborhood, composed of people of eminent respectability, and well circumstanced financially, and several were wealthy. Several were of that class, whose health and comfort made necessary their periodical attendance at watering places and pleasure resorts, where the rates were high, and golf courses a necessity, and now and then a visit to a foreign country, to vary the monotony of life.

The evidence, proves, that the husband was a good husband and father; that he made ample provisions for his wife and two sons in accordance with their station in life, in the circle of society, in which they moved. He was

sober and industrious, and attentive to his business affairs, and of unchallenged moral character. The wife was of unimpeachable moral character; a kind and affectionate mother; an excellent housekeeper; and possessed the very commendable trait of remaining more closely at her home and attending more strictly to her duties as a wife and mother, than any other woman in her social circle, in her neighborhood. The first appearance, in the record of any friction between the husband and wife was when in the year, 1912, the husband appeared at the home of the wife's father, in Birmingham, Ala., and represented to his father-in-law, that his wife did not treat his friends right, and that they were not agreeing, and that some change would have to occur to enable them to live agreeably. The father-in-law, immediately, addressed a letter to his daughter, in which he counseled her to live agreeably with her husband, and advised, that they, mutually, forbear with each other. Afterwards, the father-in-law, came, twice, at the request of his son-in-law, and he and his son-in-law, and his daughter discussed the causes of the differences, between them. The husband claimed, that the wife did not treat his friends in a proper way, while the wife complained, that her husband's mother intermeddled with her affairs, and her husband, continuously, neglected her, by remaining out to a late hour, at night, and left her in the house, alone. Every witness, who testified, except certain ones, which will hereafter be mentioned, deposed, that so far as they ever had opportunity to see or know, the appellant and appellee treated each other kindly, and no friction was observable between them. On the 26th day of June, 1913, the husband left the house, taking with him, certain of his personal belongings, and one of his sons, and, has since that time, persistently, refused to return to his wife, or to become reconciled to her. On the same day, the wife, in great distress, called upon her mother-in-law and interceded with her to try to influence her husband to return to her, but the mother-in-law declined to do so. She frequently, called upon him, at the house, in which he stayed, after that time, and on one occasion, in the presence of others, requested him to return. She sought the assistance of the minister, who officiated at the marriage rites between them, and of the rehdcaon of the diocese, in which the church of which

she was a member is situated, to effect a reconciliation with her husband and to induce him to again live with her, as her husband. These reverend gentlemen, after several requests to the husband, by letters, which he ignored, secured a meeting between the husband and wife, for the purpose of trying to induce him to again resume marital relations with his wife. He appeared at the meeting, accompanied by his attorneys, but, refused to discuss living with his wife any more, but proposed, that she obtain a divorce, and that he would settle certain sums upon her, in the way of alimony. On this occasion, he said to his wife, that her treatment of his mother, had "killed" his love for her. In May, 1916, he instituted a suit for divorce from his wife, in which he charged her with having abandoned him, but this, he dismissed, in July following. The wife, as it appears, never ceased to intercede with her husband to become reconciled to her, and in this suit, again besought him to return to her.

This suit was instituted by the wife, in December, 1916, to require the husband to pay her the sum of \$50,000.00 and for the use of the dwelling during her lifetime, as alimony. The court adjudged, that she recover of her husband, the sum of \$33,500.00, her costs, and attorneys' fees, and adjudged her the right to use and occupy the dwelling house, under certain restrictions. The dwelling house is agreed to be of the value of \$12,500.00. The husband was required to maintain and educate the boys, except at such time, as they should be with their mother, when she should be at the expense of their board. There is no complaint made of the decree so far as it relates to the custody, education and maintenance of the boys. The husband has appealed from the judgment, and insists, that the court was in error, in adjudging to the wife, any alimony; while the wife has prayed a cross-appeal from the judgment and insists, that the alimony allowed, was not in such sum, as she is entitled to have.

(a) The record discloses, that there is no hope for a reconciliation of these litigants; that the wife is anxious to resume marital relations with the husband, but, he has a fixed aversion to the wife, and fixed determination to never live with her, again; and has removed from Ashland to the city of New York. It is admitted, that he separated himself from his wife and refused to return to

or live with her or permit her to live with him, at any place. He denies, that he left his wife without excuse or fault upon her part, and alleges as his reason for so doing that she did not control her temper, but, continuously, for two years, nagged, and scolded him, gave way to fits of temper, insulted his friends, and humiliated and embarrassed him, and utterly destroyed his happiness, while with her, and that he had no other means of escaping the troubles, except to leave her. The only evidence, which tends to prove, that she ever quarreled or scolded him, is that of a negro man, who was for several months, a servant in the house, and he states that she, frequently, quarreled at her husband, but, he does not state anything that she ever said, or any subject, about which a quarrel was had. This witness is a strong partisan of the husband, as he claims, that the wife insulted him, at some time since the separation, by a refusal to allow him to serve her with punch, at a social function, and, accompanied her refusal, by calling him a "stinking" negro. Another servant, who was in the house at the same time, the one mentioned above was serving, deposes, that she never "heard a fuss between them." The witness, who claims to have received the insult, is contradicted by another, who was present, when the alleged insult was given, and who deposes, that it did not occur. The mother of the husband deposes, that on the day of the separation, when the wife, weeping, besought her to use her influence to restore her husband to her, she said, she had treated her husband badly, because she was jealous of his regard for his mother. A lady, at whose home, the husband lived, after the separation, deposed that on one occasion, the wife, when visiting the house, said that she did not blame her husband for leaving her, because she had been a "devil" to him for a year. The evidence, further shows, that the wife was of a nervous temperament and suffered from a nervous affliction, and within a few days, after the separation, was confined for several weeks, to her bed, from neuresthenia, or nervous prostration, and for a portion of the time, was in an unconscious condition, and a few months later, suffered from a similar attack. The insults to friends of the husband, complained of, are as follows: In the year 1907, six years preceding the separation the husband was attacked with typhoid fever, and while confined to

his room, a witness, visited him each day, and on one occasion, the wife answered the door-bell and said: "Why, are you here again?" and turned away without accompanying him to her husband's room. During the same attack of fever, a witness, who had charged the wife to not allow any one to go to the sick room except a nurse or physician, and not to permit her husband to know, what was the matter with him, later returned and informed him of the nature of the disease. When the wife learned this, she called the witness over the telephone and said to him, that her husband had grown worse since being told, with what he was afflicted, and that if witness returned, she would "shoot his brains out." The witness says, that she, at the time, was in a hysterical condition. A few weeks preceding the separation, the wife started upon a journey, with friends, to be gone over night, and enjoined upon her husband to take care of the little boys. She did not go, only, a part of the journey and returned home, between seven and eight o'clock, at night. The boys were not at home, when she arrived. The husband had invited two friends to visit him upon that evening. When the wife found the boys from home she became excited, and urged her husband to go and seek the boys, which he declined to do, assuring her, that the boys were safe, and in her conversation, she accused her husband of failing to keep his promise, and insinuated, that his company were "cheap politicians," and the automobiles, owned by them, were not of the best. Nine or ten years, before the separation, she, on one occasion, became angry with her mother-in-law, and at a later date, cut down flowers which the mother-in-law had planted in the yard of her son. Upon the whole, it may be inferred, that the wife, unfortunately, had more temper, than was conducive to never failing agreeableness, but, the above, are the proven instances of its exhibition, during thirteen years of married life. While it may be inferred, that there were other occasions, when she made exhibitions of a bad temper, upon this evidence, it can not be inferred or presumed, that she habitually allowed it to control her, in her actions, toward her husband, and if she did not hesitate to make a public exhibition of her temper, as is charged against her, the occasions, when she allowed herself to be influenced by it, are few. If the husband, for a year or two, continuously, remained out,

until a late hour with his friends, and left his wife alone, and this seems to have been proven; and if he promised to care for the little boys, and they were away from home, at night, at eight o'clock, while they may have been perfectly safe, it can not be said, that her exhibitions of temper on these occasions were entirely without excuse, and free from any fault upon his part. The want of affection, between the wife and the husband's mother, appears to have been without any good reason, upon either side, and each is proven to have expressed a dislike for the other. The proof abundantly shows, that the husband's mother was a woman of fine character and no one gainsays it, but, the unexplainable dislike, sometimes, of husbands, as well as wives, for their mothers-in-law, is a part of the history and traditions of our race, and though usually such dislike is foolish and unwarranted, each one will have an opinion upon this subject, somewhat, in accordance with his experiences. In all of this, however, there appears no legal reason for the husband abandoning his wife, and thereafter, turning a deaf ear to all attempts at reconciliation upon her part, as though the wife had been guilty of some grave wrong, which human nature and morality could not tolerate. When men and women enter into the marriage relation, they take each other with all their weaknesses, faults and foibles, and must bear with each other, unless, the one or the other is guilty of something, which the law makes an excuse for abandonment. The complaints of the wife, about the use of the family automobile, and the attentions of the husband to his mother's company, are without any good reason, but, they constitute no reason for the husband to abandon his wife. The legislative authorities in this state, have never thought it necessary to provide any relief for a husband, on account of the temper of his wife. While subsection 3 of that clause of section 2117, Ky. Stats. which enumerates the grounds for a divorce on behalf of the wife, when not in like fault, provides, that she may obtain a divorce from the husband, on account of such cruel beating or injury, or attempts at injury as indicate an outrageous temper in the husband, or probable danger to her life, or great injury from remaining with him. The temper, it will be observed, which will justify a divorce from the husband, is one evidenced by cruel beating or injury, or at-

tempt at injury. By subsection 2, of the same clause, a divorce will be granted to her, if the husband, habitually behaves toward her, for not less than six months, in such cruel and inhuman manner, as to indicate a settled aversion to her, or to permanently destroy her peace and happiness. Not every sporadic exhibition of temper, or several such exhibitions, on the part of the husband, will justify the wife in abandoning him, if they are not habitual and do not show a settled aversion or permanently destroy her peace and happiness. It has never been held, that occasional petulances of temper, or rude language, by the husband, is sufficient ground to justify the wife in abandoning her husband. *Beall v. Beall*, 80 Ky. 675; *Morrison v. Morrison*, 10 R. 683.

To hold, that occasional outbursts of temper and sallies of passion, which were of such character, as not to show a settled aversion to the wife, or permanently destroy her peace and happiness, or to render it probable, that she would be in danger of losing her life, or bodily injury from remaining with her husband, do not justify, the wife in abandoning her husband; a holding that such exhibitions of temper or passion would justify the husband in the abandonment of his wife, would surely not rest upon any logical foundation. This court has continuously held, that mere fits of ill-temper by the wife or occasional quarrels with her husband, caused by her, or scolding by the wife, do not justify the husband, in abandoning his wife, in the absence of anything to endanger his personal safety. *Canine v. Canine*, 13 R. 124; *Hodgen v. Hodgen*, 160 Ky. 267; *Logan v. Logan*, 2 B. M. 142.

The purpose of the law is to impress upon parties to the marriage, that it is as permanent as their lives, and can not be thrown off for mere whims, or mere frailties, or shortcomings, of the parties, which do not amount to moral delinquencies, nor endanger life or person, nor permanently destroy happiness, and altogether a wife may be somewhat disagreeable, and make the marriage relation, frequently, unhappy, the husband has no legal right to abandon her. If he abandons her without legal right, the common law obligation still rests upon him to maintain and support her, and hence, she is entitled to alimony from him, and to be entitled to alimony, it is

not necessary, that she should be entirely free of fault, where she has been guilty of no moral delinquency, because such requirements, would give to the husband an undue advantage, and besides, most marital troubles, are to some extent, the fault of both parties. 1 R. C. L. 879; *Green v. Green*, 152 Ky. 486; *Pore v. Pore*, 20 R. 1980; *Lacey v. Lacey*, 95 Ky. 110; *Anderson v. Anderson*, 113 Ky. 389; *Zumbeil v. Zumbeil*, 113 Ky. 841; *Club v. Club*, 23 R. 650; *Griffin v. Griffin*, 8 B. M. 120.

(b) As to the amount of the alimony, the proof shows, that the wife is entirely without property, and the principle applying, whether the granting of permanent alimony be considered as damages for breach of the marriage covenant, or the exercise of a sound judicial discretion, in providing for the wife an allowance out of the husband's estate, is that the alimony awarded, should be so apportioned, as to secure to the wife, the same social standing, comforts, and luxuries of life, as she would have had, but for the enforced separation, considering the amount of the husband's estate, and the care of the children, if any, and the circumstances and cause of the separation; the husband's present and future prospects and his ability to earn money. *Muir v. Muir*, 133 Ky. 125; *Shehan v. Shehan*, 152 Ky. 191; *Green v. Green*, 152 Ky. 486. Without discussing the various speculative opinions, given by many witnesses, as, to the value of the husband's estate, it appears for the purposes of this adjudication, that his estate is of the value of near to \$150,000.00. There has never been a hard and fast rule adopted, as to what proportion of the estate of the husband, should be awarded the wife as permanent alimony, but it is a matter confided to the sound discretion of the chancellor, and each case has been determined upon the special facts and circumstances appearing and the adjudicated cases show, that the allowance has varied from a fifth to one-half of the husband's estate in cases, where divorce has been granted, as will appear from the following cases: *Irwin v. Irwin*, 107 Ky. 24; *Muir v. Muir*, 133 Ky. 125; *McKean v. McKean*, 83 Ky. 208; *Hawkins v. Ragsdale*, 80 Ky. 353; *Fishle v. Fishle*, 2 Litt. 338; *Lockridge v. Lockridge*, 3 Dana 28; *Thornberry v. Thornberry*, 4 Litt. 251; *Lacey v. Lacey*, 95 Ky. 110; *Day v. Day*, 168 Ky. 68; *Quisenberry v. Quisenberry*, 2 Duv. 197; *Pemberton v. Pemberton*,

169 Ky. 476; Murray v. Murray, 163 Ky. 546; Shehan v. Shehan, 132 Ky. 191; Thompson v. Thompson, 155 Ky. 608; Barlow v. Barlow, 90 S. W. 216; Hooe v. Hooe, 92 S. W. 317; McClintock v. McClintock, 144 S. W. 63; Pence v. Pence, 6 B. M. 496. It is gathered, however, from the adjudicated cases, that the weight of authority, is to the effect, that a rule allowing to the wife one-third of the delinquent husband's estate, is the proper proportion, but, the special circumstances of the various cases, have caused the courts, not to adhere to this rule, in the great majority of cases, as in many cases the husband's salary or earnings or ability to earn is all the estate he has, or he may have children to maintain, or the particular cause of separation may influence the decision. Evidently, the wife should not be left in a worse condition, because of the wrongful desertion of her by her husband. In the instant case, the allowance is approximately one-third of the husband's present estate. It seems to be reasonably sufficient to provide the wife with a comfortable support, in accordance with the requirements of her past station in life, and her social environments. She asked that the use of the dwelling house be awarded her, as a part of her alimony, but, not under the restrictions, which the court placed upon its use. It can be seen, that under these restrictions, the house may become a burden to her and she will be compelled to use up the remainder of her allowance in maintaining a large house.

We are of the opinion, that the portion of the judgment decreeing to her the use of the house, should be modified as follows: that she have the use so long as she may desire to do so, and does not become the wife of another, with the conditions, that she keep it in a reasonable state of repair, and without the right to rent it and the husband pay the taxes thereon, but, in the event, at any time, she elects to give up the possession and use of the house, to the husband, she will give him notice of that fact, after which time, he will pay to her the sum of \$50.00 per month, so long as she does not marry another, in lieu of the house, but, if the husband desires to do so, he may pay to her the sum of \$12,500.00 which is practically the value of the use of the house for the period of twenty-six, and a fraction years, the period of the wife's probability of living and be discharged from

the obligation to pay to her the sum of \$50.00 per month. In other respects the judgment is affirmed.

The judgment is therefore affirmed upon the appeal, and reversed upon the cross-appeal.

Gragg v. Levi, et al.

(Decided February 4, 1919.)

Appeal from Harrison Circuit Court.

1. **Limitation of Actions—Action to Recover Money Paid by Mistake.**—An action to recover money paid through mistake, must be commenced within five years next after the cause of action accrues; and the cause of action shall not be deemed to have accrued until the discovery of mistake, or until it could, by the exercise of reasonable diligence, have been discovered; nevertheless no such action shall be brought ten years after the making of the mistake.
2. **Limitation of Actions—Mistake.**—The duty is upon the complainant to exercise reasonable diligence to discover the mistake, and if he fails to do so, an action by him will not lie after the expiration of the five year period.
3. **Limitation of Actions—Mistake.**—If a plaintiff allow the five year period to elapse before commencing his action, and thereafter attempts to rely upon the discovery of the mistake within five years next before the commencement of his action, it is incumbent upon him to both allege and prove, if denied, that the mistake was not only discovered within the five years next before the institution of the action, but that the mistake could not have been sooner discovered by him by the exercise of reasonable diligence on his part.
4. **Limitation of Actions—Mistake.**—Although it be alleged by plaintiff that the mistake was first discovered within five years next before the commencement of the action, and that it could not have been sooner discovered by him by the use of reasonable diligence, yet his action will be dismissed if he fails to establish both of said allegations by proof, if they be denied.
5. **Limitation of Actions—Mistake.**—The presumption will be indulged, in the absence of a showing to the contrary, that the mistake was discovered by the party against whom it was made immediately following its occurrence.

C. M. JEWETT for appellant.

HANSON PETERSON for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

In 1908 Gragg sold Levi a tract of land supposed to contain 98 acres at \$90.00 per acre, with the agreement that the boundary should be surveyed by a named surveyor and acreage ascertained. The surveyor reported that the boundary contained 104-80/100 acres, and Levi paid Gragg \$90 per acre, for that number of acres, and immediately took possession of the tract. In 1915 Levi died the owner of the tract, and appellees, his sons, having sold the land in 1916, caused it to be surveyed, and found that it contained only 98 acres, a deficit of approximately six acres. Gragg refused to refund the purchase price paid in excess of that due, and Levi's executors brought this action to recover \$612.00 and interest, being the amount paid in excess of the total purchase price at \$90.00 per acre. The petition, as amended, alleged the purchase, acreage and price per acre, amount paid and deficiency in acreage, and further that the mistake in acreage, made by the surveyor in calculating was not discovered by appellees, or their predecessor, until within five years before the commencement of the action, and said mistake could not, by the exercise of reasonable diligence, have been sooner discovered. The allegation of mistake, its discovery within five years, and that it could not have been sooner discovered, is traversed by the answer. By a second paragraph of the answer it is affirmatively alleged that the mistake in acreage, if any, was discovered by plaintiffs and their predecessor in title more than five years before the commencement of the action; but if not so discovered could have been discovered, by the exercise of reasonable diligence, more than five years before the action was instituted, and express reliance was placed upon the five year statute of limitation. No reply was filed. Judgment was entered below for Levi's executors, and Gragg appeals.

Obviously, it is a question of the proper application of the statute of limitation, and the law of diligence. An action to recover money paid through mistake must be commenced within five years next after the cause of action accrued. Section 2515 Kentucky Statutes. But the cause of action shall not be deemed to have accrued until the discovery of the mistake; nevertheless no such action shall be brought ten years after the making of the mistake. Section 2519 Kentucky Statutes.

Construing these two sections together, this court has held that a plaintiff has an absolute right to begin his action within the five year period, but if he allows the five year period to elapse before commencing his action, it is incumbent upon him to both allege and prove, if denied, that the mistake was not only discovered for the first time within the five years next before the institution of the action, but that the mistake could not have been sooner discovered by the exercise of reasonable diligence on his part. *Wood v. James*, 87 Ky. 511; *Cotton v. Brown*, 9 K. L. R. 115; *Cavanaugh v. Britt*, 90 Ky. 273; *Lex. & O. Ry. Co. v. Bridges*, 7 B. M. 556; *Provident Savings Life Co. v. Withers*, 132 Ky. 541; *Nave v. Price*, 108 Ky. 105; *Edwin v. Moore*, 2 N. M. 65; *Grundy v. Grundy*, 12 B. M. 51; *Yeager, Admr. v. Bank*, 125 Ky. 183; *Childers v. Bales*, 124 S. W. 94; *Exchange Bank v. Trimble*, 108 Ky. 230; *Green v. Salman*, 23 K. L. R. 517; *Rowe v. Horton*, 65 Texas, 93; *Smith v. Fly*, 24 Texas, 345; *Fritschler v. Korhler*, 83 Ky. 78; *Baker v. Begley*, 155 Ky. 236; *City of Louisville v. O'Donaghue*, 157 Ky. 245; *Zackay's Admr. v. Hicks*, 7 K. L. R. 756.

The necessary allegations were sufficiently made by plaintiffs in their petition in this case, but said allegations were denied by defendant in his answer. The burden of proof was thereby cast on the plaintiffs, and they did not sustain it by evidence. As said in *Woods v. James*, *supra*: "If the plaintiff has let the five years in which he has the absolute right to bring his action pass, and undertakes to bring and maintain it afterwards, upon the ground that he has discovered the fraud within five years last past, he must allege and prove, if denied, not only that he discovered the fraud within the last five years, but that he could not, with the use of ordinary diligence, have discovered the fraud until within the five years before the action was commenced, . . . it is not alleged that the appellees, by the use of ordinary diligence, could not have discovered the fraud within five years from the making of said deed. The only evidence in reference to the discovery of the fraud is that . . . they discovered the fraud within five years next before bringing their action. They state no fact or circumstance indicating that they could not, by the use of ordinary diligence, have discovered the fraud within five years from the making of the deed.

Therefore, the proof was not sufficient to sustain the action."

The evidence in the case at bar is presented by an agreed statement of facts. On the controverted point the evidence is as follows: "The plaintiffs (Levis) who are sons of the decedent, were appointed executors under the will of said R. J. Levi, and as such they sold the said tract of land in February, 1916, and between that time and March 1st, 1916, the executors caused a re-survey of said land, and found that the said tract contained only 98 acres, and that the same is correct . . . that immediately after discovering said shortage, to-wit, on the — day of ———, 1916, the executors gave notice to Edgar Gragg that the said tracts contained only 98 acres and demanded of him a refunding of \$612.00, which payment he refused to make, and thereafter on the 22nd day of June, 1916, a petition in equity was filed in the Harrison circuit court which is the action pending herein."

This evidence shows when the executors of Levi found the deficiency in acreage, whether for the first time or not, but it does not prove that Levi, the purchaser, did not know of the mistake all the time. So far as the agreed statement of facts shows R. J. Levi, the purchaser, knew of the mistake—shortage of acreage—every day after the execution of the deed in 1908, up until his death, in 1915, more than seven years; it may also be presumed that appellees, executors of the estate of their father, had such information of the mistake five years or more before the commencement of the action, as would have put prudent persons upon inquiry, and brought about a discovery. While appellees in 1916, "found that the said tract contained only 98 acres," this may not have been the first time they so found the shortage, or it may be, so far as the proof shows, that appellees found the acreage a little more or a little less than 98 acres; this evidence is not inconsistent with the claim of appellant that appellees' ancestor acquiesced in the mistake from the beginning. In the absence of an allegation and proof to the contrary, the presumption will be indulged that the mistake was discovered by the party asserting it immediately following its happening. The burden of proof was upon plaintiffs below, and the five year period having elapsed it was incumbent upon them to establish

by evidence that the mistake was not discovered, and could not have been discovered by the exercise of reasonable diligence, until within five years before the action was commenced, and failing so to do their cause fails. Statutes of limitation are statutes of repose. Courts lend their aid to the vigilant, not to the slothful. One must act while the evidence covering the transaction is fresh and may be produced. Here one of the parties is dead, hence important evidence is hushed. There could be no better illustration of the reason for the rule and statute, than furnished by the facts of this case. If a plaintiff allows the statutory period of five years to elapse before he begins his action for mistake, he will be denied the right to maintain it, unless he allege and prove, if denied, a legal or equitable excuse for such delay; but in no event shall the time allowed exceed ten years from the making of the mistake.

Appellees insist that there is no bill of exceptions, and, therefore, nothing for this court to consider on this appeal except the sufficiency of the pleadings to support the judgment. The force of this insistence is destroyed by the fact that the pleadings, orders, exhibits, statement of facts, judgment, motion and grounds for new trial and order thereon, and order noting and filing the bill of exceptions, are properly and duly certified by the presiding judge.

As the allegations of appellees' petition, which were denied, were unsupported by evidence in material parts, the judgment must be reversed with directions to dismiss the petition.

Judgment reversed. Whole court sitting.

Burnside Excelsior Company v. Bryant.

(Decided February 4, 1919.)

Appeal from Boyle Circuit Court.

1. **Logs and Logging—Timber Contract—Action for Deficiency—Evidence—Sufficiency.**—In an action for deficiency upon a sale of timber, evidence examined and held that the jury's finding in favor of the defendant was not flagrantly against the evidence.
2. **Logs and Logging—Timber Contract—Action for Deficiency—Evidence—Admissibility.**—In an action for deficiency upon a sale of timber, where no question of title was presented, evidence, as to

how much timber had been cut and how much remained on the lands of the defendant, was not inadmissible on the ground that the witnesses were permitted to prove the defendant's title by parol evidence.

VIRGIL P. SMITH and C. C. BAGBY for appellant.

E. V. PURYEAR for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

By written contract dated November 19, 1907, Roberta S. Bryant sold to the Burnside Excelsior Company all of the linn and buckeye timber, suitable for making excelsior, then growing upon her lands situated on either side of the Cumberland river, or any of its tributaries, between Jasper's Ferry and Cumberland Falls. The Burnside Excelsior Company was to pay therefor \$1.00 per cord and ten cents per cord for inspection, and was to have two years in which to cut and remove the timber. At the same time, it paid to Mrs. Bryant the sum of \$1,000.00, as an advance payment on the timber. Before the expiration of the time for cutting and removing the timber the Burnside Excelsior Company paid an additional \$50.00, in consideration of which, the time was extended for another year.

Alleging that Mrs. Bryant furnished and delivered only 362 cords of timber, and that the \$50.00 paid for the extension of the agreement was without consideration, the Burnside Excelsior Company brought this suit to recover the difference between the value of the timber furnished; and the \$1,000.00 paid, or the sum of \$638.00, together with the sum of \$50.00. It further alleged that by reason of defendant's failure to deliver the one thousand cords of wood it was compelled to purchase other wood at an expense of \$1.00 per cord, and by reason thereof, had been damaged in the sum of \$638.00. The allegations of the petition were denied by answer and a trial before a jury resulted in a verdict and judgment for defendant. Plaintiff appeals.

It appears from the record that Mrs. Bryant owned a very large body of land. After the contract was made, she notified plaintiff not to cut the timber on the lands known as the Stringer and Hudson tracts and the Campbell tracts, because those tracts were in litigation. The

only substantial issue in the case was whether defendants delivered to plaintiff one thousand cords of linn and buckeye timber suitable for making excelsior. If she did, then it was the duty of plaintiff to cut and remove it within the time fixed by the contract. If she did not, then plaintiff was entitled to recover the difference between the value of the timber furnished and the \$1,000.00. Five witnesses testified for the plaintiff, and their evidence is to the effect that, after the 362 cords of timber were cut, there remained upon what was known as the Bryant lands, excluding the Stringer and Hudson and Campbell tracts, practically no linn and buckeye timber suitable for making excelsior. On the other hand, L. E. Bryant, a son and agent of defendant, testified that plaintiff's manager represented to him, at the time the contract was made, that there were five thousand cords of linn and buckeye timber on the Bryant land suitable for making excelsior. He further stated that, in his opinion, there were more than five thousand cords of such timber on the land at that time. Two other witnesses were introduced, whose testimony tended to show that there was still left on the Bryant land more than enough timber to make up the deficit between the amount cut by plaintiff and the amount paid for. While it is true that the numerical weight of the testimony is in favor of plaintiff, the cross-examination of the witnesses for plaintiff developed the fact that the Bryant lands embraced many thousands of acres, and that the examination which those witnesses made of the lands was not as thorough as it might have been. Under these circumstances, we are not prepared to say that the jury's finding is flagrantly against the evidence.

Another ground urged for reversal is that defendant's witnesses were permitted to prove Mrs. Bryant's title to the land by parol evidence. With the exception of the Stringer and Hudson tracts and the Campbell tracts, to which the testimony complained of did not relate, no question of title was presented. The only question was how much timber had been cut, and how much remained on the other Bryant lands. The evidence complained of bore on these questions entirely, and not on the ownership of the land. Therefore, its admission was not error.

Judgment affirmed.

Smallwood, et ux. v. Lawson, et al.

(Decided February 7, 1919.)

Appeal from Garrard Circuit Court.

1. **Appeal and Error—Finding of Chancellor.**—Where there is a conflict in the evidence and upon a review or consideration of the entire record the mind is left in doubt as to the correctness of the judgment appealed from this court will not disturb the findings of the chancellor.
2. **Trusts—Removal of Trustee.**—If anything interferes to prevent a just and proper discharge of the trust and fiducial duties of the trustee or the trust is not being properly conducted, or by reason of hostility between the trustor and the trustee the court should be convinced that a change in trustees would be advisable, the trustee can be removed.

J. E. ROBINSON and E. H. TOMLINSON for appellants.

L. L. WALKER for W. L. Lawson, Trustee.

WILLIAM HERNDON for infant appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellant Jesse Smallwood is a colored man about 70 years of age. He has four children, one a son thirty odd years of age, by a former marriage, and three infant children by his last marriage.

In the fall of 1913 a nephew of appellant died, and as an heir-at-law of said nephew he was entitled to an interest in his estate, of an approximate value of \$6,000.00.

Appellant lived on the farm of the appellee, Lawson, near Lancaster, for twenty odd years, and appears to have been a faithful and trusted employee, and both employer and employee seem to have had implicit confidence in one another.

Appellant had a half-sister and a son living in Lexington, where the estate was to be settled, and his sister employed an attorney by the name of Ross to represent appellant in the settlement of the nephew's estate. Appellant also requested the appellee, Lawson, to advise with him about it.

When notice was received from the Lexington attorney that they were ready to make a settlement the appellant and appellee, in company with a Mr. Hamilton, went to Lexington and after a conference of about two hours, in the attorney's office, where various things pertaining

to appellant's interest in the estate were discussed, a deed of trust was drawn, in which appellant placed \$5,000.00 in trust with the appellee, Lawson, as trustee, with the provision that the appellant should have the income therefrom during his life and after his death his wife should be paid \$10.00 per month, the balance of the income, during the lifetime of his wife, to be paid to the infant children; after the death of the wife the entire property to be divided in equal parts among the three infant children.

This deed of trust was duly signed and acknowledged by the appellant and his wife. According to the terms of the deed the trustee was required to give a bond to be approved by the judge of the county court of Garrard county, for the faithful performance of his trust.

Some time after this instrument was acknowledged and recorded it appears that some disagreement arose between the appellant and the appellee, and the appellant was told if he did not do a certain thing he could get off the place, and he did leave the appellee's farm. Later being advised as to the nature of the instrument he had signed, and claiming it was contrary to his expressed wishes and intentions, appellant and his wife brought this suit against the appellee, Lawson, individually and as trustee (the infants being made defendants), in which they alleged that the deed of trust was procured through fraud and undue influence, and asked that it be cancelled and appellee be compelled to turn over to the appellant all the money received by him from the nephew's estate.

According to the testimony of the appellant it was never his intention to put his property in trust; the idea he always had in mind was to buy a farm so that he could have a home in his declining years. He can neither read nor write, and he claims he did not understand the meaning or purport of the deed of trust which was drawn up in the office at Lexington, and now sought to be cancelled; he says the paper was not read to him and he never authorized any one to put his money or property in trust; that he does not know what a trustee is; he says when he went to the clerk's office in Lancaster, to acknowledge and record the paper, one of the clerks read some of it to him; that he put his hand to the pen and walked out; that he thought he was signing a paper to

get his money; his wife, Lucy, testifies to practically the same effect, saying she did not understand the meaning of the paper. The wife says that at the time she went to the clerk's office the paper was read to her but that she did not understand exactly what it was; she thought she was signing a paper to get the money.

The deputy clerk who took the acknowledgment testifies he read the paper to both the appellants; that his custom was to ask parties executing an instrument of any kind whether they understood the nature of what they were signing, but he does not recall whether, according to his custom, he explained this deed to appellants.

For the appellee, the substance of the evidence of the three witnesses testifying is that the attorney, H. E. Ross, had previously drawn a trust agreement for the half-sister of appellant, in which she placed \$10,000.00 in trust in the Phoenix-Third Trust Company, of Lexington, and it was suggested it might be a good idea for the appellant to place a part of his money in trust; the details of the trust agreement were gone into, and the nature of the instrument thoroughly explained to the appellant. It was suggested he put it in the same company as the estate of his half-sister, but it was finally agreed that inasmuch as appellant lived in another county it would be better to put it in the name of appellee. Appellant then instructed the attorney to go ahead and prepare the paper. Under the deed he would have an income of approximately \$300.00 a year and at his death his wife would receive an amount that would be equal to her dower interest, should the money be invested in land instead of being placed in trust.

It seems from the evidence that the appellee's eldest son, Sam Smallwood, was worth between two and three thousand dollars, and for this reason he received nothing under the trust deed.

It will serve no useful purpose to go into further details as to the evidence, as we think this is a case that falls within the rule announced in *Bacon v. Dabney*, 183 Ky. 193, this day decided, viz.: that where there is a conflict in the evidence, and upon a review or consideration of the entire record the mind is left in doubt as to the correctness of the judgment appealed from, this court will not disturb the findings of the chancellor. Willoughby, et

al. v. Reynolds, 182 Ky. 1; McGoodwin, et al. v. Shelby, et al., 182 Ky. 377; Manchester National Bank v. Herndon, 181 Ky. 117; Bond v. Bond, 150 Ky. 389; Byassee v. Evans, 143 Ky. 415.

Under the trust agreement the trustee is to invest the money in real estate or mortgage notes on real estate, and since it is the evident desire of appellant to own a home, if an advantageous purchase of a farm can be made within the amount placed in trust, and the trustee or the court deem it advisable to make such investment it should be done.

In his answer in this case the trustee states that he is willing at any time to turn over said fund to any trustee the court may select, provided that said trust paper is upheld and sustained. But even though the trustee should refuse to resign, if anything interferes to prevent a just and proper discharge of the trust or fiducial duties of the trustee, or the trust is not being properly conducted, or by reason of hostility between the trustor and the trustee the court should be convinced that a change in trustees would be advisable this can be done.

On one of his early trips to Lexington appellant received about \$150.00 from the estate, said payment being made through the attorney Ross, and there is a further sum to be paid the appellant; the trustee testifies that he has paid out certain amounts to and on behalf of the appellant for taxes, doctors' bills, horse, wagon, etc., but any sum to which the appellant might be entitled over and above the amount fixed in the trust deed should be paid to the appellant direct and without further delay. The trustee, of course, will keep a true and accurate account of his trust and make due and proper reports thereof.

Counsel for appellant contends that the testimony of the attorney Ross was incompetent, but we will not enter into a discussion of this matter because the evidence for the appellee, other than that of the attorney, is sufficient to sustain the judgment of the chancellor.

The lower court entered a judgment to the effect that the trust agreement was valid and binding, and free of any fraud in its execution and delivery, and under the familiar rule above referred to we do not feel authorized to disturb the judgment, and same is accordingly affirmed.

Bacon v. Dabney.

(Decided February 7, 1919.)

Appeal from Christian Circuit Court.

1. **Appeal and Error—Finding of Chancellor.**—Where the evidence is conflicting and the questions of fact by reason thereof difficult of solution, if upon a consideration of the whole case the mind is left in doubt as to the correctness of the judgment the findings of the chancellor will not be disturbed.
2. **Deeds—Undue Influence—Burden of Proof.**—Where there exists between two persons a relation of confidence and trust, by which one may exert an undue influence over the judgment of the other, and a voluntary conveyance beneficial to the grantee is made, the burden of proof is on the person benefited to show the grantor acted freely and of her own volition.

TRIMBLE & BELL for appellant.

FRANK RIVES and J. C. DUFFY for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

The appellant, plaintiff below, is a colored woman about 80 years of age, blind and uneducated; she has been married three times; her second husband was a soldier in the Federal army during the Civil War; in 1890 she received a pension from the government of approximately \$1,500.00. By her first husband she had one daughter, Julia; Julia had two sons, one Fields Bentley and the other the appellee, Edward Dabney.

After receiving her pension money plaintiff purchased a lot in the city of Hopkinsville and erected thereon a residence in which she has continuously resided from the time of its completion until the present. This house seems to have been the home for her entire family, including her daughter, during her lifetime, and her son-in-law during his lifetime, and in late years the home of the two grandsons and their wives.

Carrying out her intention, many times expressed, of giving to each of her grandsons a certain portion of her property, she conveyed to Fields Bentley a portion thereof, being what is known as the "lower lot," about 100 feet in width.

In 1911 the appellee was arrested while in Louisville, and so as to secure his release, and at the solicitation of

his father, appellant consented to and did execute a mortgage on the property owned by her in the sum of \$190.00, the mortgagee being Mr. Frank Rives, an attorney in Hopkinsville, who is attorney for the appellee in this case. The appellee and his father both promised they would see that the mortgage was paid off, but this was never done.

At the time of the execution of the mortgage in September, 1911, at the request of appellee, and in keeping with her original intention, she testified that she authorized him to have a deed prepared to what she terms her "upper lot," or the garden spot. This would have left her the house in which they all lived, but instead of making a deed to the upper lot alone it appears that the deed, which has been duly acknowledged and recorded, is in fact a conveyance of all her property remaining after the deed to Fields Bentley, being a conveyance to the appellee, Edward Dabney, subject only to a life estate to the appellant and a life estate to appellee's father.

A short time after she discovered the nature and effect of the instrument she had signed (by her mark) and acknowledged, suit was brought to have said deed cancelled and held for naught. The issues were made up and after certain depositions had been taken it appears that by some agreement among the parties the suit was dismissed without prejudice. Some time later the present suit was instituted seeking cancellation of said deed, claiming that the appellee falsely and fraudulently represented to her that said deed only embraced the 100 feet contained in the garden spot. The lower court held that the deed was the voluntary act of the appellant and a reasonable disposition of said property was not obtained by the appellee through any misrepresentation or fraud. The court required appellee to either pay off the mortgage or secure a release of same as to the life interest of the appellant, and the judgment recites that on April 7, 1917, the mortgage lien so far as it affected the life interest of the appellee was released.

According to the testimony of the appellant and those testifying in her behalf she did not intend to convey to the appellee anything more than the garden spot, her idea being to retain her home; but, on the other hand, the deed was prepared by Mr. Frank Rives, an honorable and respected member of the Hopkinsville bar.

Counsel for appellant make it clear in their brief they are not charging that Mr. Rives in any way misrepresented the purport or meaning of the deed to the appellant, or even failed to make such explanation to her as the circumstances may seem to have warranted, counsels' contention being that appellant did not understand the nature or effect of the deed, as she was relying on the statement made to her by appellee, and notwithstanding the explanation by Mr. Rives, she still had in mind she was conveying only the upper lot.

Mr. Rives testified at great length as to the conversation with the appellant leading up to the drafting of the deed, and its final execution. He says that Aunt Jane, as she is called in the record, told him she wanted to deed Ed, the appellee, the balance of the property; that he read the deed over to her two or three times; talked with her about it and asked her if she understood it and she said she did, and he says George Dabney, the appellee's father, was insisting he was entitled to one-half the place, and he (Rives) suggested that she give George a life interest in the deed to satisfy him, and having thus fully explained the entire matter to Aunt Jane she told him to make the deed, which he did.

It is a well settled principle of law that where the evidence is conflicting, and the questions of fact by reason thereof difficult of solution, if upon a consideration of the whole case the mind is left in doubt as to the correctness of the judgment, the finding of the chancellor will not be disturbed. *Willoughby, et al. v. Reynolds, et al.*, 182 Ky. 1; *McGoodwin, et al. v. Shelby, et al.*, 182 Ky. 377; *Manchester National Bank v. Herndon*, 181 Ky. 117; *Bond v. Bond*, 150 Ky. 389.

The chancellor being familiar with the neighborhood where the case was tried and doubtless personally acquainted with the parties and witnesses, and probably knowing the location and character of the property involved, his judgment should not be reversed where the proof is contradictory, unless in the opinion of this court the judgment is against the decided weight of the evidence. We find a conflict in the evidence in this case, but cannot say that the decided weight is one way or the other. The fact that the first suit was dismissed; that the mortgage has been released as to the appellant's life interest; that it seems to have been her purpose to

treat the two grandsons alike; and while the evidence as to the value of the property conveyed to the two grandsons is indefinite and unsatisfactory, even though the appellee gets the house and the garden spot the value of the property he receives is not so great as that received by Fields Bentley, the evidence being that Fields Bentley received property worth approximately \$2,000.00, while the property conveyed in the deed sought to be cancelled is not worth over \$800.00. Aunt Jane still receives a pension from the government, and is being cared for by Fields Bentley and his wife, although the appellee and his wife live in the same house, and occasionally render her some assistance.

We are not unmindful of the line of cases holding where there exists between two persons a relation of confidence and trust by which one may exert an undue influence over the judgment of the other, that where a voluntary conveyance beneficial to the grantee is made, the burden of proof is on the person benefited to show the grantor acted freely and of her own volition. *Hoeb v. Maschinot*, 140 Ky. 330. But after a thorough and careful study of this record we cannot say the evidence is such as to justify us in overruling the findings of the chancellor.

For the reasons stated the judgment will have to be affirmed.

Stevenson v. Yates.

(Decided February 7, 1919.)

Appeal from Kenton Circuit Court.

1. **Physicians and Surgeons—Injury from Want of Knowledge and Skill.**—A physician or surgeon is answerable for an injury sustained by his patient resulting from want of the requisite knowledge and skill, or from his failure to use reasonable care and diligence in the treatment of the patient, including a diagnosis of the case so as to discover the patient's malady; and the standard of skill which the physician should possess and the care which he should exercise is that skill and care and diligence possessed and exercised by physicians in similar neighborhoods and similar surroundings and engaged in the same general line of practice.

2. **Appeal and Error—Directed Verdict.**—A directed verdict is not authorized unless after admitting all of the testimony introduced by the one against whom it is directed, and after fair and reasonable inference that might be deducible therefrom, he has failed to make out a case; and this rule prevails although the court would be authorized to set aside the verdict if one should be returned against the litigant making the request.
3. **Physicians and Surgeons—Injury from Want of Knowledge and Skill—Evidence.**—A pregnant woman applied to defendant, a practicing physician, for treatment. Defendant diagnosed the case as kidney trouble and gave plaintiff some strong medicines that after taking produced pains and nausea and made plaintiff nervous. After four months plaintiff, who was forty-two years old and never been pregnant before, suggested the possibility of pregnancy and defendant said no, that the pain and enlargement were due to gas in plaintiff's stomach and gave her more strong medicine and advised her to continue her work, which she did, until she was stricken with labor pains after which she gave birth to a dead child. Held, that a peremptory instruction to find for defendant at close of plaintiff's testimony was improper.

B. F. GRAZIANI for appellant.

ROBERT C. SIMMONS for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellee and defendant below, S. Annie Yates, is a physician and maintains an office in the city of Cincinnati, Ohio. The appellant and plaintiff below, Mrs. Louise Stevenson, is a married woman living in Covington, and at the time of the matters herein complained of she was about forty-two years of age, having been married about fifteen years and had never borne children.

Defendant had been plaintiff's physician for some ten years or more, but it had been some time prior to February, 1915, since defendant administered in any way to plaintiff. On that day plaintiff visited defendant's office and stated to her certain symptoms which plaintiff had experienced and was experiencing, and at the time requested defendant to take charge of her case and submitted herself to defendant for proper treatment. This, of course, required as a prerequisite a proper diagnosis of plaintiff's affliction. Defendant made no physical examination but stood behind the plaintiff while she was seated in a chair and held plaintiff's hands for about ten minutes when she told plaintiff that she was suffering with kidney trouble. The symptoms which

plaintiff related to defendant were that she was suffering with shortness of breath, with pains in her back and stomach and perhaps some others. At that time defendant prescribed for plaintiff and gave her different kinds of medicines, to be taken at prescribed times, sufficient to last for three weeks, during which time plaintiff was required to and did report to defendant her condition. Plaintiff continued to visit defendant's office at periods of about three weeks apart, each time reporting her condition and symptoms as well as the effect of the medicines until some time in June, when, not having been improved, and having experienced, as she says, a crawling sensation in the lower part of her abdomen, which she at that time reported to defendant and asked her if it could be possible that she was pregnant. Defendant told her that she was not pregnant but that she was suffering with stomach and kidney trouble, and that her condition was approaching near Bright's disease.

Another quantity of medicine was prescribed and plaintiff commenced to visit defendant's office more frequently and continued to do so until the 15th day of October in that year. Throughout the whole time plaintiff had no periods of menstruation, they being entirely suppressed, a fact which defendant also knew.

On the 19th day of October, four days after plaintiff's last visit to defendant's office, there appeared a slight hemorrhage from plaintiff's privates of which defendant was notified by telephone as well as notified of other conditions and symptoms of plaintiff; and defendant expressed satisfaction over what she said was a return of plaintiff's menses, and asked plaintiff to visit her office on the following Saturday, which was the 23rd of October.

Plaintiff continued to take defendant's treatment although suffering considerably and her condition not improving until Saturday morning, when another physician was called in, who discovered that plaintiff was then in labor and about to become a mother. She was removed to a hospital where, about seven o'clock that night, a fully developed dead child was taken from her with the aid of instruments, after administering to her an anesthetic.

She stayed in the hospital about two weeks and returned home in a weakened condition and very nervous.

It became necessary, some sixty days thereafter, to return to the hospital, where a slight operation was performed due to conditions resulting from the childbirth. Her weakened and nervous condition continued from that time, according to her testimony, till the day of the trial.

Plaintiff brought this malpractice suit against defendant alleging unskillfulness in properly diagnosing her case, and both unskillfulness and negligence in the treatment administered as well as advice given relative to plaintiff's conduct while in a state of pregnancy. She alleged that the medicine administered was of a very strong character and produced pains and rigors within about one hour after being taken, causing plaintiff to become nauseated and very nervous. She furthermore alleged that defendant improperly advised her to continue to do her house work, which she had done throughout her married life, and which consisted in cooking, washing, ironing and general house cleaning, together with operating a sewing machine, and perhaps other labor which it was charged was improper to be performed by a pregnant woman.

The answer was a denial only of the negligent acts charged. Upon the trial and at the close of plaintiff's testimony the court sustained the defendant's motion for a peremptory instruction for the jury to find in her favor, which resulted in a verdict accordingly, followed by a judgment dismissing the petition, and to reverse it plaintiff prosecutes this appeal.

The law is well settled in this, and we believe in all jurisdictions, that a physician or surgeon is answerable for an injury to his patient resulting from want of the requisite knowledge and skill or from the omission to use reasonable care and diligence in the treatment of the patient or to exercise such care and diligence to discover the patient's malady. 21 R. C. L. 379; *Dorris v. Warford*, 124 Ky. 768; *Vanmeter v. Crews*, 149 Ky. 335; *Acton v. Smith*, 150 Ky. 703; *Mason, et al. v. Meloan*, 165 Ky. 582; *Burk v. Foster*, 114 Ky. 20, and *Barnett's Admr. v. Brand*, 165 Ky. 616.

Concerning the standard of knowledge and skill and the required care which the physician should possess and exercise under this rule, it is quite generally agreed that he is bound to bestow such reasonable and ordinary

care, skill and diligence as physicians and surgeons in similar neighborhoods and surroundings engaged in the same general line of practice ordinarily have and exercise in like cases. R. C. L., *supra*, 381, and cases above referred to.

Plaintiff, upon the trial, after testifying in substance as hereinbefore indicated concerning the diagnosis of her case, the beginning of the treatment, etc., said: "Q. What happened after you took some of this medicine? A. Well, I continued to stay the same. I never got any better. I would feel sick, cramps in my limbs and shortness of breath. Q. Now you began to take the medicine in February? A. Yes, sir. Q. And that continued right along? A. Yes, sir, every day. Q. How soon after you took any of this medicine did you feel any pains in the stomach and have to vomit and stiffness of limbs, how long was that? A. That was all during the time. I felt that way all the time. Q. Was there any period after you began to take the medicine that you did not feel the stiff limbs, pains in the stomach and have to vomit; was there any time after you took the medicine that you did not feel this? A. There was times that I did not take the medicine, and I felt better without it. Q. That you did not feel the stiffness of limbs, pains and vomiting? A. I felt that way nearly all the time that I took the medicine. Q. How soon after taking the medicine did you begin to feel sick. A. About an hour afterwards."

She then testified in substance that in June or July she began to feel different and explained her changed symptoms to defendant, including the crawling sensation in her abdomen, when plaintiff told her she had a very powerful gas in her stomach and gave her medicine for it. From time to time thereafter she continued to inquire about the fact of her pregnancy and as late as the 15th of October this occurred. "Q. Tell the jury what occurred in October. A. She gave me the same potion to take. Q. What did she say to you? A. Said it still existed; that it was my kidneys and she wanted to get them cleared up. Q. Did you say anything to her about being pregnant? A. Yes, sir, I did. Q. What did you say to her in October, the 15th? A. Just the same as always, and then I took this (hemorrhage) on Monday night. Q. But what did she say when you told her you was pregnant? A. I told her I felt as

though something was crawling in me and she would laugh, and furthermore there was a little form right here below the abdomen, and I asked her about that and she laughed and said 'you are going through the change of life, and women can have nothing at that time.' "

She further testified: "Q. What else did she tell you with reference to your exercise? A. She said no kind of work would hurt me. Said not to go to picture shows."

Upon this advice plaintiff testified that she continued to do her household work, including sewing upon the machine almost daily, and performing other labors necessary to the running and keeping up of a house of some six or seven rooms, in which she and her husband resided; and that she would not have done this had she known that she was pregnant.

Physician witnesses testified that it is not best for a mother carrying an unborn babe to engage in exercise requiring much effort. In addition to the pain producing, nauseating and other effects of the medicine about which plaintiff testified it is shown by witnesses introduced by her that the process by which her child was taken from her was more painful and possibly more productive of impairing consequences to the mother than if the delivery had occurred in the normal way; and furthermore that the character of exercise which plaintiff took under the advice of defendant was calculated to seriously affect the mother and possibly produce the death of the unborn child.

Medical witnesses testified that at least three or four months after conception it is quite easy for a member of the profession to discover and detect pregnancy and that it is not a difficult task before that time.

The rule is universal in this jurisdiction that before the court is authorized to direct a verdict it should be prepared to say that admitting all of the testimony by the one against whom the verdict is directed and every fair and reasonable inference that might be deducible from it, he has failed to make out his case. *Shay v. R. L. & T. P. R. R. Co.*, 1 Bush 108; *United Shakers v. Underwood*, 11 Bush 265; *L. & N. R. R. Co. v. Howard*, 82 Ky. 212; *Baumeister v. Markham*, 101 Ky. 122; *Thompson v. Thompson*, 17 B. Mon. 23; *Dallman v. Handley*, 2 A. K. Mar. 418; *Buford v. L. & N. R. R. Co.*,

82 Ky. 286, and *L. & N. R. R. Co. v. Johnson's Admr.*, 161 Ky. 824. And this rule prevails although the presiding judge be of the opinion that if the jury should find adversely to the litigant making the request for such instruction, he would be compelled to sustain his motion for a new trial. *Buford v. L. & N. R. R. Co.*, *supra*; *Thompson v. Thompson*, *supra*; and *Payne Clothing Co. v. Payne*, 21 Ky. Law Rep. 1226.

Under the rule thus prevailing in this state we cannot escape the conviction that the court was in error in directing a verdict in favor of defendant. The motion for a peremptory instruction is in the nature of a demurrer to the evidence and admits the truth of all the evidence introduced by the litigant against whom the verdict is directed. It is therefore admitted in this case that defendant was either greatly unskillful or grossly negligent in failing to properly diagnose plaintiff's case, and because of that or for other reasons equally negligent or unskillful, wrongfully advised her as to the exercise she should take and the labor she should perform, and in addition gave her medicines of sufficient strength to at once produce pain, rigors, nausea, nervousness and other weakening and debilitating effects.

It is true that it does not appear what was the quality or character of the medicines prescribed, but we think, in a case like this, where the plaintiff is wholly ignorant as to such facts, that when he shows the effects and consequences which the taking of the medicine produced the burden shifts to the defendant to show that such consequences and effects were not the results of the medicine. And furthermore that the defendant under facts similar to what we have here should be called upon to show that the advice given as to exercise and labor could not and did not produce injurious results.

We are not now called upon to determine the question whether the death of plaintiff's child would be a proper element of damage in a suit by the mother should the proof show it to have been brought about by the unskillful and careless treatment of defendant, since that question is not now before us, but we do hold that plaintiff's testimony was sufficient to authorize a finding that defendant was negligent and unskillful and that as a consequence thereof defendant suffered some pain and sustained some damages which the jury would have been

authorized to find under proper instructions from the court.

Wherefore the judgment is reversed with directions to grant a new trial and for proceedings consistent with this opinion.

Illinois Central Railroad Company, et al. v. Taylor, et al.

(Decided February 7, 1919.)

Appeal from Daviess Circuit Court.

Appeal and Error—Railroads—Deeds—Right of Way—Finding of Chancellor—Evidence—Sufficiency.—In an action between a lot owner and a railroad company, involving the proper location of a right of way, evidence held not to support the location made by the chancellor and a proper judgment directed.

W. P. SANDIDGE and TRABUE, DOOLAN & COX for appellants.

W. T. ELLIS and J. J. SWEENEY for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

This is the second appeal of this case. The opinion on the former appeal may be found in 164 Ky. 150, 175 S. W. 26. 165 Ky. 503, 177 S. W. 293.

Appellees are the owners of a lot containing 4:51 acres subject to "the right of way for railroad purposes as now established," which right of way was conveyed to appellants' predecessor in title, by deed dated July 5, 1892. On the first trial, appellants were awarded a right of way through the lot sixty-six feet in width, and appellees were adjudged to be the owners of the remainder of the lot. On appeal we held that appellants' right of way included not only the land occupied by the tracks, switches and buildings thereon, but also such additional land as was necessary to the appropriate use of such tracks, switches and buildings, in the operation of the railroad at the time the deed was made. In view of the fact that the case had not been prepared on this issue, the case was remanded in order that the parties might take further proof if they desired. On the return of the case the court rendered a judgment giving the railroad com-

panies a right of way over the lot, about forty-nine feet wide at one end and thirty-five feet wide at the other. The railroad companies again appeal.

The evidence furnished by appellants as to the number of buildings, tracks, etc., on the lot and their location at the time the deed was made, is much more satisfactory than the evidence for appellees. This evidence was given by men whose duties required them to be on the lot at that time, and who had every opportunity to observe the conditions then existing. On the other hand, the evidence for appellees was given by witnesses, two of whom were mere boys when the deed was made, and the third did not move into the neighborhood until several years after that time. Viewing the judgment in the light of the testimony of these witnesses, we conclude that it falls short of giving to appellants all the right of way to which they are entitled.

On the return of the case the court will enter judgment, giving to appellants the following right of way: Beginning on the east side of Triplett street, at a point 70 feet north of the north end of the cross-ties under a switch track now at said place; thence east at right angles to Triplett street and 70 feet from the north end of the cross-ties, a distance of 250 feet; thence south and at right angles to a point 30 feet from the north end of the cross-ties; thence east and at right angles to the prior line to the eastern line of the lot in question; thence south with said eastern line to the southeast corner of the lot; thence with the south line of the lot to the east side of Triplett street; thence north with the east side of Triplett street to the place of beginning. At the same time, appellees will be adjudged the owners of the remainder of the lot.

Judgment reversed and cause remanded with directions to enter judgment in conformity with this opinion.

Consolidation Coal Company v. Bailey.

(Decided February 7, 1919.)

Appeal from Johnson Circuit Court.

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1. **Appeal and Error—Law of the Case.**—The opinion of the Court of Appeals upon the first appeal of a case is the law of the case, upon subsequent appeals, under substantially the same facts, not

only with respect: (1) to errors relied upon for a reversal on the first appeal and which, are mentioned in the first opinion; (2) to errors relied on but not noticed in the opinion, but (3) also as to errors appearing in the first record that might have been but were not then relied upon.

2. **Appeal and Error—Law of the Case.**—The rule that the opinion upon the first appeal is the law of the case in subsequent appeals under substantially the same facts, applies to all cases where the opinion does not expressly state that a particular point is not passed upon; and an opinion upon a first appeal conclusively settles the question of the sufficiency of the pleadings, the competency of the testimony, and its sufficiency to take the case to the jury.

EDWARD C. O'REAR, J. B. ADAMSON, ALLIE W. YOUNG and
M. C. KIRK for appellant.

VAUGHAN & HOWES for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

This is the second appeal of this case, the first opinion being reported in 178 Ky. 114, wherein the facts are stated in detail. Upon the first trial there was a judgment in favor of plaintiff (appellee) for the sum of \$1,700.00, and on appeal the judgment was reversed upon the ground that the court refused to instruct the jury upon the concrete facts which defendant claimed constituted contributory negligence and which were embodied in instruction "B," offered at the trial, but which was refused. The court held that under the peculiar facts of the case, and under the doctrine of a number of cases cited in the opinion, the trial court should have given to the jury instruction "B," and for that error alone the judgment was reversed. It was insisted upon that appeal that defendant's motion for a peremptory instruction should have prevailed. This insistence was based upon the theory that under rule 13, which defendant claimed was the only rule upon the subject, it was the duty of plaintiff to inspect the roof of the room in which he was at work at the time he received the injuries, and that he failed to do so, thereby entitling defendant to the peremptory instruction offered. It was furthermore insisted upon that appeal that the court should have given to the jury instruction "A," offered by defendant on the first trial. That instruction assumed that rule 13 was unqualifiedly in force at the time of the accident. But it was held that there was a conflict of evi-

dence upon this point, and for that reason the court did not err in refusing to give instruction "A." Upon a second trial of the case the court gave to the jury instruction "B," as directed on the former appeal, and declined to give instruction "A," which was again offered by defendant, and the jury returned a verdict in favor of plaintiff for the sum of \$1,450.00, and complaining of it the defendant prosecutes this appeal.

The rule is well settled that the opinion of this court on the first appeal of the case is the law of that case upon all subsequent appeals where the facts are substantially the same, not only as to errors relied upon for reversal on the first appeal, but also as to all errors relied upon and not noticed in the opinion, all of which appear in the record on the first appeal and which might have been but were not relied upon. Consolidation Coal Co. v. Moore, 179 Ky. 293; N. C. & St. L. Ry. Co. v. Henry, 168 Ky. 455; Same v. Same, *idem*, 581; Dupoyster v. Ft. Jefferson Improvement Co., 121 Ky. 518; Illinois Life Insurance Co. v. Wortham, 119 S. W. (Ky.) 802; Stewart's Admr. v. L. & N. R. R. Co., 136 Ky. 717, and other cases referred to therein. So, under this rule, if the facts appearing in the record before us are substantially the same as those appearing in the first record, all questions determined or which were presented by the first record, whether relied on and determined or not, are now *res adjudicata* between the parties. This rule does not seem to be disputed by appellant, but it is insisted that the evidence on the last trial shows without contradiction that rule 13, relied on by defendant, was not only in force at the time plaintiff received his injuries, but that it was the only rule by which he or the defendant was to be governed under the particular facts, circumstances and conditions existing at the time of the accident, and that for that reason instruction "A" should have been given to the jury upon the last trial.

We have carefully examined the testimony adduced at both trials upon this point, and we fail to find any substantial difference in it. On the first trial plaintiff's testimony upon this question was: "Q. The rules that you speak about that the company had there, was it a printed book of rules? A. Yes, sir. Q. I will get you to examine this book and see whether or not that was the book of rules that they had, Mr. Bailey? A. I guess

that is the same rules." The rules referred to were adopted in July, 1914. There had been other rules adopted in 1911, and there was evidence on the first trial that the 1911 rules had not been wholly superseded by those adopted in 1914, and for that reason the court in the first opinion, as a basis for upholding the trial court in refusing to give to the jury instruction "A," said:

"If the proof of the existence of the rule had been contradicted the court should have so treated it by giving instruction 'A;' but as there was some proof tending to show that an old and different rule was in force, the court should have given instruction 'B,' which presented the law under the rule, but left the fact of the existence of the rule to be determined by the jury."

Upon the last trial, on this issue the plaintiff testified thus: "Q. I hand you the rule book which appears to be approved and in force and effect in July, 1914, and ask you if that is the same rule book you refer to having in your possession a few moments ago? A. I could not say positively. Q. This is the same one I had a moment ago—I want to know if that book of rules was in force at the time you had a book in your possession? A. That seems to be the book they gave me. Q. That was the book they were operating under at that time? A. They worked by part of them rules. Q. This book of rules which shows to have been in force July 11, 1911, was superseded by the one I have just shown you? A. I guess so. Q. That book was in force at the time you were working there? A. Yes, sir, I believe it is. . . . Please state whether or not rule 13, as read by Mr. Kirk, is one of the rules in force in that mine on that subject at the time you were injured? A. There were some rules. I don't know whether they worked by it."

Practically the same testimony with reference to the existence of the 1911 rules and their being in force at the time of the accident that was heard upon the first trial was introduced upon the last one.

So that the same contradictions of evidence on this point which appeared in the record when the case was first here are to be found in the present record, and this court's former opinion under the doctrine, *supra*, is necessarily binding upon the parties. We therefore con-

clude that the court did not err upon the last trial when it refused to give to the jury instruction "A."

The insistence that the peremptory instruction was justified is largely if not entirely based upon the theory that rule 13 was the only one in force at the time of the injury, and that the evidence is uncontradicted that plaintiff failed to observe the requirements of that rule; i. e., that he neglected to make the character of inspection which that rule required of him. This same contention was presented and determined adversely to the defendant on the first appeal, and unless the testimony heard on the last trial on that issue is substantially different from what it was on the first trial, we would be compelled to again deny it under the rule alluded to.

Upon each of the trials the plaintiff testified that he had no recollection of sounding the roof of the place where he was at work other than making the place for the jack with his pick. He also testified that he examined the roof with his eye and that he usually made soundings for the purpose of determining the condition of the roof. There is no practical difference in the testimony given by him on the two trials upon this point, and it was not shown upon either trial that the only practical way of determining the condition of the roof was by soundings made for that purpose, some of the testimony being to the effect that using the pick as plaintiff did for the purpose of making a hole in the roof for the jack was sufficient to detect the condition of the roof. This being the condition of the testimony upon that issue on each of the trials, the first opinion of the case upon that particular issue must govern the rights of the parties, and the court did not err in declining to give the peremptory instruction upon the last trial.

In discussing the questions presented counsel for defendant refer us to a number of cases from this court to the effect that where it is the duty of the servant to inspect and he neglects to do so, he can not complain of his master if he sustains injuries, but those same cases were relied upon on the first appeal, where the facts, as we have seen, were substantially the same as those contained in the present record, and whatever might be said as to the applicability of those cases as an original proposition, the *res adjudicata* rule referred to prevents their application upon this appeal.

There is no complaint as to the extent of the injuries, or the size of the verdict. The only two errors urged for a reversal not being available, for the reasons stated, there is no alternative but to affirm the judgment, which is accordingly done.

Held v. Commonwealth.

(Decided February 7, 1919.)

Appeal from Daviess Circuit Court.

1. **Homicide—Involuntary Manslaughter—Instructions.**—Where one accused of manslaughter is convicted of involuntary manslaughter, the instruction upon voluntary manslaughter, even if erroneous, is not prejudicial to the accused.
2. **Homicide—Involuntary Manslaughter—Instructions.**—The mere fact that two different states of case described in the evidence, which separately constitute involuntary manslaughter are presented separately in two instructions is not prejudicial error, although it would have been better practice to combine the two into one instruction.
3. **Homicide—Involuntary Manslaughter—Instructions.**—Involuntary manslaughter at common law is where death unintentionally results to another from the doing of an unlawful act, or the doing of a lawful act in an unlawful manner, and not having been treated of by statute, is cognizable and punishable as a common law offense in this State.
4. **Criminal Law—Negligence in Use of Dangerous Agency.**—Carelessness or negligence in the use of an agency necessarily dangerous to the life, limb or property of another, in close proximity thereto, is culpable.
5. **Criminal Law—Careless Operation of Automobile—Negligence.**—An automobile when being operated upon a public street of a city within the business district during business hours, is an agency necessarily dangerous to the life, limb and property of others, whose presence at such time and place must be anticipated; and its careless operation under such circumstances is culpable negligence.
6. **Homicide—Involuntary Manslaughter—Instructions.**—An instruction submitting as an element of involuntary manslaughter, carelessness or negligence in the operation of an automobile upon a public street of a city within the business district and during business hours, is not erroneous but proper.

CLEMENTS & CLEMENTS and **LOUIS I. IGLEHEART** for appellant.

CHARLES H. MORRIS, Attorney General, and **OVERTON S. HOGAN**, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

The appellant is appealing from a judgment convicting him of involuntary manslaughter and fixing his punishment at confinement for twelve months in jail and the payment of a fine of \$500.00 for driving or forcing an automobile over or against Ernest Combs, a fifteen year old boy, early in the afternoon of Monday, April 8, 1917, upon a public street in the city of Owensboro, thereby inflicting injuries from which the latter died within a few hours thereafter.

The errors assigned are the trial court did not instruct the jury upon the whole law applicable to the case, and incorrectly stated the law in instructions given.

1. That the court did not, in the instructions given, cover the whole of the law applicable is upon the theory that there was evidence tending to prove that appellant had stopped his car before it struck deceased, and it was forced upon or against him by being struck by another automobile operated by one Miley Baskett, but the evidence does not sustain such a contention, as appellant himself testified that Baskett was following closely behind him just before he struck deceased, and that "Baskett's car came up from the rear and brushed my front fender and threw me on over." He was then asked and answered the following: "Q. Did it strike your running gear? A. No, I don't think it did. I think it struck the fender and brushed as he went past me. I couldn't tell whether it was the front or the rear of his car. Q. You could not tell whether it swiped from front or behind? A. No, sir. Q. And you had already struck the boy at that time, had you not? A. Yes, sir; before Miley struck me, and when Miley struck me it pushed me right hard and I couldn't stop. Q. It pushed you over the boy? A. I don't know about that. I don't know whether he did or not."

Baskett did not testify, and no witness testified in contradiction of appellant's testimony upon this question, except there is some confusion as to whether Baskett's car in passing struck the front or rear fender of appellant's car.

2. The first instruction, upon voluntary manslaughter, is severely criticised, and it is not in such form that we would care to approve it as a guide for future

trials, although it seems to be free from substantial error; but however that may be, it is not pertinently involved upon this appeal, since appellant was not convicted under it, but for a lesser offense, and he was not prejudiced thereby, regardless of whether it correctly submitted the graver offense, so we shall proceed to a consideration of instructions 2 and 3, both of which treat of involuntary manslaughter, of which appellant was convicted, to see if they or either of them contain prejudicial error.

They are as follows:

2. "If the jury believe from the evidence, that the accused, Browning Held, did not intend to force or drive said automobile in, upon, or against Ernest Combs or in a manner reasonably calculated to endanger the lives of persons then and there upon the highway, and that at such time the accused believed, and had reasonable grounds to believe, that there was no danger in driving said automobile in the manner he then drove same, but further believe from the evidence, to the exclusion of a reasonable doubt, that in this county, and within twelve months next before the finding of this indictment, the defendant did drive or force said automobile in a careless or reckless manner, in, upon or against said Ernest Combs and that the killing of said Ernest Combs resulted from such carelessness, forcing or driving of said automobile by the accused (if such there was) then the jury should find the defendant guilty of involuntary manslaughter, an offense included in the indictment, and fix his punishment by imprisonment in the county jail in the reasonable discretion of the jury, or by fine in their reasonable discretion, or both by fine and imprisonment in the county jail in their reasonable discretion, and the jury may say in their verdict that said fine or imprisonment, or both, shall be at hard labor, in their reasonable discretion.

3. "If the jury believe from the evidence, to the exclusion of a reasonable doubt, that at the time the automobile in question struck said Ernest Combs (if it did so) the same was proceeding upon a street or highway of the city of Owensboro, Kentucky, at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway or so as to endanger the

life or limb or injure the property of another person, then such speed was unlawful, and if the jury believe further from the evidence, to the exclusion of a reasonable doubt, that said automobile struck and killed said Ernest Combs or caused him to sustain certain mortal hurts, wounds, or fractures as described in the foregoing instruction while going at such speed, from which said Earnest Combs did die within a day thereafter, the jury should find the defendant guilty of involuntary manslaughter, an offense included in the indictment, and fix his punishment as provided in instruction No. 2, unless they further believe from the evidence, to the exclusion of every reasonable doubt, that said automobile was being driven as described in instruction No. 1, in which event they will find as directed in instruction No. 1."

Obviously, it would have been much better, both from a standpoint of artful preparation and of easy comprehension, had the two instructions been combined, but the mere fact that the different conditions described in the evidence which separately made the homicide involuntary manslaughter, were separately presented in two rather than one instruction, if correctly set forth, certainly would not be prejudicial error since unless defendant's conviction was authorized by the jury upon proof of facts not amounting to the offense of involuntary manslaughter, he has no valid cause for complaint under our code, so far as these two instructions are concerned.

It will be seen that instruction No. 2 makes of the homicide involuntary manslaughter, if committed unintentionally, by the careless operation of an automobile upon a highway, while instruction No. 3 states that the homicide was also involuntary manslaughter, if it resulted from defendant's operation of an automobile upon a street in the city of Owensboro, "at a speed greater than was reasonable and proper, having regard to the traffic and use of the highway or so as to endanger the life or limb or injure the property of another person," such rate of speed at that place being declared unlawful.

It is therefore apparent that the court was attempting to present by separate instructions the two elements always recognized in common law definitions of involuntary manslaughter; the one, unintentional killing resulting from the doing of an unlawful act, and the other

where death unintentionally results from doing a lawful act in an unlawful manner; the latter of the two instructions employs the very language of subsection 9, section 2739 of Kentucky Statutes, in describing what is an unlawful rate of speed in the operation of an automobile upon a public highway within the city, and had this instruction embodied the idea of unintentional killing, which it does not, it would have correctly described involuntary manslaughter resulting from the doing of an unlawful act, and the jury were permitted to find the defendant guilty of involuntary manslaughter, if he caused the death of Ernest Combs, while doing an unlawful act, whether intentional or unintentional, evidently by an oversight, of which the defendant can not complain, because the instruction was thereby made much more favorable to him than was proper.

It is therefore apparent instruction No. 3 contained no prejudicial error.

While instruction No. 2 seems to us to unnecessarily qualify the defendant's intention by the clause, "and that at such time the accused believed, and had reasonable grounds to believe, that there was no danger in driving said automobile in the manner he then drove same," but as this did not affect the instruction prejudicially to the defendant, but rather beneficially, he can not complain thereof, and there is not in the whole instruction, so far as we can discern, anything prejudicial to defendant's substantial rights, if as a matter of law the careless operation of an automobile near the middle of the day upon a public street, and within the business district of a city of the size of Owensboro, amounts to the doing of a lawful act in an unlawful manner, within the meaning of the ordinarily accepted definition of involuntary manslaughter. This is, we apprehend, the only close question presented by either of the two instructions now under consideration.

This is the first case that has reached this court, involving criminal liability for homicide resulting from the operation of an automobile, but the principles of law involved are thoroughly settled in this jurisdiction, and there can be no doubt that under the decisions of this court, carelessness or negligence or recklessness in the performance of a lawful act, which results in the death of another, is always unlawful and criminal if the

agency employed was at the time and place of a character that its negligent or reckless use was necessarily dangerous to human life or limb or property; and this dangerous character of the agency employed has been accepted in this state in a long line of decisions, as sufficient to render a reckless or negligent or careless use criminal, upon the theory, no doubt, that a want of ordinary care in the use of such an instrumentality in the presence of others or upon a crowded thoroughfare in a city or where others were naturally expected to be, is gross negligence, and it is quite apparent that such a position is logically correct, for there are many instrumentalities of death with reference to which a want of ordinary care in proximity to others is carelessness of the grossest kind. So it may be conceded that at common law, culpable negligence in a criminal prosecution had to be of the quality known as gross negligence, and it is true no doubt that any negligence less than gross negligence in the performance of a lawful act, would be insufficient to make of an unintentional killing, the offense of involuntary manslaughter (see notes to 90 A. S. R. 571; 30 L. R. A. (N. S.) 458; 33 L. R. A. (N. S.) 408 and 135 A. S. R. 293), but it is not at all necessary that to attain this result, it is necessary in all cases to refer to the culpable carelessness or negligence, as gross negligence, because where in an instruction the agency and circumstances surrounding the homicide are described, the same result is obtained by treating as culpable the *careless* use of a necessarily dangerous instrumentality in a public place or in such close proximity to others, as to endanger their lives. So we find in the case of *York v. Comlth.*, 82 Ky. 361, it was held, as a matter of law, that an unintentional killing which resulted from the *careless* pointing of a loaded and cocked shot gun at another, was at the least *voluntary* manslaughter, and that upon such evidence there was no evidence whatever upon which to base an involuntary manslaughter charge.

In *Chrystal v. Comlth.*, 9 Bush 669, this court quoted with approval from 2 Wharton American Criminal Law, sec. 1004:

“Whatever may be the difference as to the degrees of homicide, a party whose negligence causes the death of another is in like manner responsible, whether the business in which he was engaged was legal or illegal.

. . . But even where the business is perfectly legal, negligence in the discharge of it when producing homicide is manslaughter;" but suggested as a necessary qualification thereof:

"To this general rule there may be exceptions, as where an act, careless in itself, is committed with fatal results under circumstances or at a place from which it might be reasonably inferred that no injury could happen from the carelessness of the party acting. But this is not of that exceptional class of cases; and, considering the instruction complained of, as we must, with reference to its application to the facts, we must conclude that the court did not err in giving it to the jury."

In that case, the court approved an instruction upon voluntary manslaughter based upon the "recklessly careless" use of a loaded pistol in a room where others were present, and affirmed a conviction thereunder carrying with it confinement in the penitentiary, from which it is clear that if a "recklessly careless" use of a loaded pistol amounts to voluntary manslaughter, a want of ordinary care in its use in the presence of others liable to kill, and which does kill, would necessarily be involuntary manslaughter. See also to the same effect *Sparks v. Comlth.*, 3 Bush 111; *Smith v. Comlth.*, 93 Ky. 320.

So the remaining question to be determined, and this is the only new feature presented by this case, is whether or not the negligent operation of an automobile upon a public street in the business section of the city of Owensboro, near the middle of the day, was such careless use of a dangerous agency at a time and place, which, as a matter of law, may be such want of care as under the circumstances, to amount to gross or culpable negligence. If so, then all of the authorities in this state at least, where the common law still applies to such offenses as this, which have not been regulated by statute, are to the effect that such carelessness is culpable negligence involving criminality.

The evidence shows that the place of the accident on West Fifth street, between St. Ann and Frederica streets, in Owensboro, is near the heart of the business section, and within less than a square and upon the same street with the postoffice, and Owensboro is, we know, judicially, a city of the third class, with a population of

more than eight thousand people. The testimony as to the rate of speed at which defendant was operating his automobile just before it struck the deceased, for the Commonwealth is, that he was going at a rate of from thirty to forty or fifty miles an hour, and racing with the automobile following him, while the defendant in his own behalf, testifies that as he approached St. Ann street, out of which deceased came riding a bicycle, he was going at a rate of about twenty-five miles an hour; so there can be no question that the court properly presented to the jury in the third instruction the question for consideration and determination, of whether or not at the time and place described in the evidence, defendant was operating his car unlawfully, and if so, authorized the jury to find him guilty of involuntary manslaughter, if the killing, though unintentional, resulted from his doing this unlawful act. It is also shown in the proof for the Commonwealth, that the defendant at the time his car struck the deceased, was within four or five feet of the curb on the right hand side of the street, where the deceased had a right to be, and where the defendant did not have a right to be, as it was his duty to go round to the left of the defendant. It was shown for the defendant, however, that deceased became confused and turned first one way and then the other, and the defendant attempted to avoid striking him by turning in first one direction and then the other; and while the contributory negligence, if any, of the deceased is not available to the defendant as a defense, this evidence was relevant and competent upon the question of whether or not the defendant, in the operation of his car, was negligent and thereby unintentionally committed the homicide, without regard to the rate of speed at which he was proceeding, and this was evidence sufficient to submit to the jury the question of whether or not the death was unintentional, but the result of negligence or carelessness in doing a lawful act; and as we have seen under the circumstances of this case, the place and time where the accident occurred and the agency from which it resulted, were of such character as made it proper for the court to submit to the jury the question of negligence as an element of the offense, because in our judgment, a want of ordinary care in the operation of an automobile within the business district of a city near the noon hour,

where the presence of others upon the highway must be anticipated, is such use of an agency dangerous to life, limb and property of others, as makes any negligence which results in the death of another, unlawful and criminal. We therefore do not find in either of these two instructions any prejudicial error.

Complaint is also made of the 4th instruction given:

"4. An 'accident' is an unusual and unexpected event happening without negligence, and if the jury believe from all the evidence in this case, that the killing of Ernest Combs by defendant (if such there was), referred to in the indictment and instructions herein, was the result of such an accident, or of an accident occurring under circumstances or conditions other than as set forth in instructions Nos. 1 and 2, they should find the defendant not guilty."

The complaint is that the court did not refer to instruction No. 3 in the latter part of the instruction "or of an accident occurring under circumstances or conditions other than are set forth in instructions No. 1 or No. 2."

The whole of this clause is superfluous, since the former part of the instruction excuses all accidents such as are therein defined and without further qualification excluded necessarily the states of case covered by instructions Nos. 1, 2 and 3, so the omission was without effect, and we do not think could have in any way influenced the verdict.

For the reasons indicated the judgment is affirmed.

P. Lorillard Company v. Ross, Sheriff.

(Decided February 7, 1919.)

Appeal from Jefferson Circuit Court.

1. **Taxation—Manufacture.**—Under a statute exempting from local taxation "raw material actually on hand at their plant for the purpose of manufacture" raw or green tobacco on hand at a factory that is only given some preliminary treatments at the factory and then sent to other factories to be put in shape for sale on the market is not exempt from local taxation.
2. **Manufacture—Meaning of Word.**—In the meaning of the statute exempting "raw material on hand for the purpose of manufac-

ture" raw material is not on hand for the purpose of manufacture unless the manufacture of such raw material at the plant where it is found is so complete as that the product may be sent out from that plant and sold on the market as a finished product.

3. **Manufacture—Definition of.**—It is not the means or methods employed nor the nature or number of processes resorted to or the size of the factory or the number of hands it employs or the volume of machinery in use, but the result accomplished that determines whether the article is manufactured or not.
4. **Taxation—When Raw Material Exempt From—Manufacture—What is.**—The test of whether raw material is on hand at a factory for the purpose of being manufactured is this—is the raw material converted at that factory or plant into a finished product complete for the final use for which it was intended or so completed as that in the ordinary course of the business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it?
5. **Taxation—Raw Material—When Exempt From—Manufacture—What is.**—It is not essential before the exemption applies that raw material should be converted at the factory into a finished product fit for the final use for which it was intended. It will be sufficient if it is on hand for the purpose of being there converted into an article ready for sale on the open market although after the product has been so sold it may be put by other parties to the final use for which it was intended.
6. **Taxation—Notice to Taxpayer of Raise of Assessment.**—Under section 4122 of the Kentucky Statutes if the Board of Supervisors raises the list of the taxpayer he must have notice of the raise or else it will be void.
7. **Taxation—Notice to Taxpayer of Raise of Assessment.**—Where a taxpayer furnishes to the Tax Commissioner a list of property that he claimed to be exempt from taxation and the Tax Commissioner accepted the list as exempt, and thereafter the Board of Supervisors without notice to the taxpayer placed the property in a list subject to taxation, this was in effect raising the assessment without notice and the action of the Board of Supervisors was void.
8. **Taxation—Injunction.**—Where a Board of Supervisors raises without notice the list of a taxpayer he may enjoin the collection of the taxes.

HUMPHREY, CRAWFORD, MIDDLETON & HUMPHREY and CHARLES W. MILNER for plaintiff.

J. MATT CHILTON and NAT C. CURETON for defendant.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Overruling motion to dissolve injunction.

This is a motion made before me to dissolve an injunction issued by a judge of the Jefferson circuit court

restraining W. E. Ross, as sheriff of Jefferson county, from collecting a certain tax bill against P. Lorillard Company. There is no dispute about the facts which appear in the petition for an injunction filed by P. Lorillard Company against the sheriff, to which a demurrer was overruled and thereupon the injunction granted. The only question in the case is—Did the facts set out in the petition authorize the injunction?

The P. Lorillard Company is a New Jersey corporation engaged in the business of manufacturing tobacco and tobacco products. In the conduct of its business it maintains various factories in the United States, located at Louisville, Kentucky, and at cities situated in New Jersey, Ohio, Maryland and other states. Its plant in Louisville consists of six large buildings, at which there are constantly employed several hundred hands. These buildings are equipped with engines, machinery and other appliances used in the course of its business. It buys tobacco in the raw or green state and ships it to its plant at Louisville, at which place it is regraded by hand and then stemmed and redried by machinery or hand; after it has been thus treated the tobacco is packed into hogsheads and shipped to other factories of the P. Lorillard Company, where it is manufactured into plug tobacco, twist tobacco, cigars and smoking tobacco.

On September 1, 1917, it had on hand at its plant in Louisville tobacco of the value of \$903,684.00 which had been redried but not stemmed, and tobacco of the value of \$298.032.00 which had been both redried and stemmed. In October, 1917, it made out and delivered to the tax commissioner of Jefferson county, in due time and manner, a schedule of all of the property owned by it that according to its view was subject to assessment in Jefferson county for state or county purposes, which schedule was accepted by the tax commissioner as made out. In this schedule it listed for assessment at a specified value certain machinery and implements used by it in connection with its factory, and under the title in the schedule "raw material at plant and products in course of manufacture" it gave the value of such raw material and products in course of manufacture at \$1,201,716.00, this being the total value of the two classes of tobacco heretofore set out.

It further appears that the tax commissioner accepted as correct the schedule as made out by the P. Lorillard Company, thus leaving exempt from taxation this tobacco, but the board of tax supervisors of Jefferson county changed the entries which the tax commissioner had made in his books in conformity with the schedule, by so altering the entries as to make the company liable for taxation on the two items of tobacco, which it had returned at the value before mentioned to the tax commissioner under the head "raw material at plant and products in course of manufacture," and this without any notice of its intention to alter the entries or its purpose to subject this tobacco to taxation and without giving the company any opportunity to appear before the board of supervisors and resist the effort to have this tobacco, which had been accepted as exempt from assessment and taxation by the tax commissioner, assessed and valued for taxation by the board of supervisors.

On the facts of the case it is the contention of the P. Lorillard Company that this tobacco in its factory at Louisville, which had been redried but not stemmed as well as that which had been both redried and stemmed, was exempt from assessment and taxation for county purposes under that provision of the act of 1917 (that may now be found in section 4019a-10, volume 3, Kentucky Statutes) exempting from local taxation: "machinery and products in course of manufacture of persons, firms or corporations actually engaged in manufacturing and their raw material actually on hand at their plants for the purpose of manufacture," the claim being that this tobacco comes within the words "raw material actually on hand at their plants for the purpose of manufacture."

We had before us in the case of American Tobacco Company v. City of Bowling Green, 181 Ky. 416, the construction of the provision of the statute here in question. In that case the facts were these:

The tobacco company had a plant at Bowling Green at which green or raw tobacco that it bought was graded according to quality, redried, a good part of it stemmed, and then put in hogsheads and shipped to other plants of the company situated at other places out of the state for

manufacture into various kinds of tobacco in common use.

It had no machinery in its plant and no manufacturing was done there except the treatment of the raw tobacco preparatory to its shipment to other factories for its manufacture.

Really the only difference between the methods employed at the plant of the Lorillard Company at Louisville and those employed at the plant of the American Tobacco Company at Bowling Green consists in the fact that the Bowling Green plant was a small one where the work of rehandling, redrying and stemming the tobacco was done by hand while the plant of the Lorillard Company, at Louisville, is a very large one and the redrying, stemming and steaming is done by machinery. At neither plant was the tobacco manufactured into cigars, plug tobacco, smoking tobacco or cigarettes. It was sent to other factories at other places to be so manufactured.

Under these facts, about which there is no dispute, we are unable to perceive any difference in the two cases that would authorize a distinction in the construction of the statute. The difference in the method employed at the two plants was only one of degree.

At neither factory was the tobacco turned out as a finished product or intended to be put upon the market for sale to any person wanting to buy it and at both places the tobacco was subjected to certain treatment that was a necessary part of the process to which the tobacco was subjected in converting it from raw material into a finished or manufactured product.

In the Bowling Green case the court said that the statute contemplated that the raw material must be manufactured at the place where the exemption from taxation was sought before the statute became applicable and that the treatment the tobacco received at Bowling Green did not constitute manufacturing in the meaning of the statute.

Elaborating a little on this definition, my opinion is that raw material on hand at a factory or plant for the purpose of manufacturing is not exempt from local taxation unless the manufacture of such raw material at the plant where it is found is so complete as that the product

may be sent out from that plant and sold on the market as a finished product.

The purpose of the legislature in allowing this exemption was to encourage the location in this state of manufacturing plants at which everything that was necessary to convert the raw material into a finished product for sale on the markets should be done at the factory or plant in this state where the raw material was on hand; and this legislative purpose should not be lost sight of in the construction of this statute.

In other words, if the Lorrillard Company at its factory in Louisville put the raw or green tobacco that it purchased into the form of smoking or chewing tobacco or cigars or other types of tobacco that are commonly sold to consumers in the open market then the raw or green tobacco at this factory or at some other building or buildings located in the city that were used in connection with and as a part of the factory and that constituted its plant at Louisville would be exempt from local taxation.

But it is admitted that the Lorrillard Company did not finish at its factory or plant in Louisville the manufacturing process to which this tobacco was subjected before it was placed on the market for sale.

It merely subjected it to certain methods of treatment and then sent it to other factories where the manufacturing process was completed and the tobacco made ready for sale in the open market as a finished product.

I do not think the number of processes or the various kinds of treatment that the raw material is subjected to before it becomes a finished product or the means or methods employed in giving it this treatment are material. Some articles might be converted by one process alone from raw material into a finished product fit and suitable to be placed on the open market and sold for the purposes and uses to which it was intended to be put, while it might be necessary to subject other articles to perhaps three or even six or a dozen separate and distinct treatments before they could or would be put on the market as a finished product or offered for sale to customers generally for the purposes or uses to which it was intended to put them. It is not the means or methods employed or the number or nature of the pro-

cesses resorted to, but the result accomplished that determines whether the article is manufactured or not.

Nor is the question of exemption from or liability to taxation to be determined by the size of the factory or the number of hands it employs or the volume of machinery in use. It is wholly immaterial whether the factory is a small one or large one or whether the processes to which it subjects the raw material are performed by hand or by machinery.

Numbers of cases may be found in which the courts have defined the words "manufacture," "manufacturer," "manufacturing," "manufactured," but in all these cases the courts constantly kept in mind the purpose of the legislation and endeavored to give such a construction to these words as would carry out the legislative intent, and on account of this inclination different meanings have been ascribed to the words; but it may safely be said that the general rule is that no article is considered manufactured until it has been put into condition for sale on the open market for the purpose for which it was intended to be used.

Out of many cases supporting this view the following may be selected:

In *Hartranft v. Wiegmann*, 121 U. S. 609, 30 Law Ed. 1012, the question before the court was when shells found on the sea shore should be considered as manufactured for commercial purposes. It appears from the opinion that the shells were subjected to certain treatments which the court, in holding did not constitute manufacture, said: "They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton." . . . "In *Frazee v. Moffit*, 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, though labor had been bestowed in cutting and drying the grass and bailing the hay. In *Lawrence v. Allen*, 48 U. S., 7 How. 785 (12:914), it was held that India rubber

shoes, made in Brazil, by simply allowing the sap of the India rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and designed to be used in such new form. In *United States v. Potts*, 9 U. S. 5 Cranch. 284 (3:102), round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson*, 1 Hunt's Merchants' Magazine, 167, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured."

In *Tide Water Oil Company v. United States*, 171 U. S. 210, 43 Law Ed. 139, the court said: "The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name. Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. . . .

"It is not always easy to determine the difference between a complete and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article, can only be said to be partially manufactured within the meaning of this section."

In *Kidd v. Pearson*, 128 U. S. 1, 32 Law Ed. 346, the court said: "Manufacture is transformation—the fashioning of raw materials into a change of form for use."

In *Lawrence v. Allen*, 7 How. U. S., 12 Law Ed. 914, the question before the court was when rubber should be treated as a manufactured article, and the court said that the word "manufacture" "is making an article,

whether by hand or machinery, into a new form, capable of being used, and designed to be used in ordinary life."

In *Bogard v. Tyler*, 21 Ky. Law Rep. 1452, it was held that a saw mill at which lumber was sawed for sale on the market was a manufacturing establishment because the evidence showed that "the saw mill was engaged in manufacturing lumber for the market."

To the same effect is *Graham v. Magamm-Fawk Lumber Company*, 117 Ky. 192. Other illustrative cases are: *Sharp v. Hasey*, 134 Wis. 618; *State v. Tichenor Antiseptic Co.*, 118 La. 686; *In Re Toledo Portland Cement Co.*, 156 Fed. 83.

In *Century Dictionary* the word "manufacture" is defined as "the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, properties or combinations, whether by hand labor or by machinery." And in *Webster* the word "manufacture" is defined: "To work, as raw or partly wrought materials, into suitable forms for use."

Giving to the word "manufacture" its commonly understood meaning and the definition laid down in the authorities cited and the meaning I think it was intended it should have in this statute it is an easy matter to determine in every case whether or not the raw material at any plant or factory is exempt from local taxation, the test being—Is the raw material converted at that factory or plant into a finished product complete for the final use for which it was intended, or so completed as that in the ordinary course of the business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it? I do not think it essential that before the exemption applies the raw materials should be converted at the factory or plant where it is found into a finished product fit and ready for the final use to which it was intended to be put. For example, green or raw hides that are intended in their final use to be converted into boots or shoes might well be considered as a manufactured product within the meaning of the statute, when by preliminary processes they had been put into condition for sale on the open market as finished hides that persons engaged in the manufacture of shoes or boots would buy to convert into these articles; and so a plant that was engaged in the manufacture of logs

into lumber or doors or sash or other finished products ready for sale on the open market would be entitled to the exemption, although after the product had been sold in the open market it was put by other parties to the final use for which it was originally intended.

But where raw material is only subjected to certain preliminary or partial processes no one or all of which are sufficient to convert it into an article ready for sale on the open market or into an article ready for the final use intended in its manufacture, these processes do not constitute manufacturing within the meaning of the statute. A ready example of this class of partial manufacturing is found in the case we have. Here the tobacco in its raw state was on hand for the purpose of being subjected to certain processes that would convert it into a suitable article for sale to consumers. It was not put on the open market as a finished or completed product until it had been subjected to all the various treatments that converted it from raw or green tobacco into cigars, cigarettes, chewing or smoking or other types of tobacco commonly in use. It continued to remain in a partially manufactured condition until the process of manufacture had been entirely completed and the tobacco was ready for sale to consumers in the open market.

If the construction contended for in this case by the Lorillard Company should obtain all raw material on hand at a plant or factory in this state at which it was subjected to some preliminary process or treatment would be exempt from taxation although no part of the material, if it had been subjected to these processes or treatments, could be sent out from the factory as a finished product. For example it is necessary in the manufacture of tobacco that it should be regraded. Regrading is one of the processes that green or raw tobacco is subjected to before it becomes a finished product, and so if a factory in this state purchased raw or green tobacco only for the purpose of regrading it the raw or green tobacco on hand for the purpose of regrading would be as clearly exempt from taxation as if it was on hand for the purpose of being regraded, redried and stemmed. But raw tobacco on hand merely for the purpose of regrading it or classifying or drying it without intending to subject it to the other treatments that would convert

it into a finished product that might be sold on the open market could not be said to be on hand for the purpose of manufacture. Plainly in such a case the raw tobacco would only be on hand for the purpose of partial manufacture.

We are therefore of the opinion that the tobacco was subject to assessment and taxation.

The remaining question is—Was the Lorrillard Company entitled to notice and an opportunity to be heard before the board of supervisors could place this tobacco under a schedule subjecting it to taxation?

Keeping in mind the fact that the Lorrillard Company reported this tobacco to the tax commissioner under an item in the schedule that exempted it from assessment and taxation and that this schedule so made out was accepted as correct by the tax commissioner, and thereafter the board of supervisors took the tobacco from under the item in the schedule that exempted it from taxation and placed it under another item that subjected it to assessment and taxation, we have no doubt that under the statute and many decisions of this court the Lorrillard Company was entitled to notice of the contemplated action of the board of supervisors, and also to opportunity to be heard before them.

It is provided in section 4120 of volume 3, Kentucky Statutes, that the board of supervisors "shall make a careful examination of the tax commissioner's books and each individual list thereof and may increase or decrease any list, and shall list all property omitted by the assessor (tax commissioner) which may be subject to taxation in the county."

It is further provided in section 4122 that "The sheriff shall notify all such taxpayers whose list has been increased or assessed by the board, and also notify them of the time to which the board adjourned."

It is further provided in section 4123 that on the re-assembling of the board that they shall hear complaints made by persons whose property was raised or assessed.

These provisions clearly show that the board of supervisors cannot raise any assessment as returned by the tax commissioner or list for assessment property omitted by the taxpayer and the tax commissioner without first giving notice to the taxpayer affected of its action, and opportunity to be heard in opposition to its

intention to raise the assessment or list for assessment omitted property.

In this case the effect of the action of the tax commissioner in accepting as correct the schedule that exempted this property from assessment and taxation was the same as if it had not been reported at all by the taxpayer to the tax commissioner or had been omitted from assessment by the tax commissioner. In other words this property was assessed for the first time by the board of supervisors, therefore the taxpayer was entitled to notice and opportunity to be heard. Not having received any notice of the action of the board of supervisors its action was void and did not authorize the sheriff to collect any taxes on this assessment and the Lorrillard Company had the right to the injunction. *Boske v. Louis Marx & Bros.*, 161 Ky. 460.

Judges Settle, Hurt and Sampson heard this matter with me and concur in what I have written and in the conclusion reached.

The motion to dissolve injunction overruled.

Penn, et al. v. Penn.

(Decided February 11, 1919.)

Appeal from Mason Circuit Court.

1. **Master and Servant—Workmen's Compensation Act—Participation in Compensation.**—Under the Workmen's Compensation Act a partially dependent father of a deceased employe may participate in the compensation, allowed by the board, with the wife of the deceased whom the law presumes to be wholly dependent, in that proportion which the partial dependency of the father bears to total dependency.
2. **Master and Servant—Workmen's Compensation Act—Award.**—The underlying purpose of the system instituted by the Workmen's Compensation Act is to provide support and maintenance for those who were dependent totally or partially upon the deceased employe in his lifetime, and to accomplish this the award made by the board should be distributed among the several dependents, total and partial, in the same proportion, as nearly as may be, that the deceased employed in taking care of the several dependents.

CHARLES H. MORRIS, D. M. HOWERTON, STANLEY REED
and CHAMBERS BAIRD for appellants.

A. D. COLE and H. W. COLE for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

A young man named Harvey Penn, employed by the Bates & Rogers Construction Company in the work of building a lock and dam on the Ohio river, was accidentally killed in the course of his employment. For some years previous only he and his father lived together, and his father was partly dependent on the son for support. His mother was dead and he had no other close relatives. About one month before the accident to and death of young Penn, he married. The Bates & Rogers Construction Company was operating under the Workmen's Compensation Act and carried insurance. Both the construction company and the insurance company recognize liability for compensation to dependents of decedent Penn; but the two dependents—the widow, Nellie Penn, and the father, James Penn—are litigating the question of what, if any, apportionment of the amount allowed under the act shall be made between the two. The widow, by the terms of the statute, is presumed to be wholly dependent upon the earnings of the husband, and this is not contested. The father, who resided in the house with the deceased, is admitted to be partially dependent. The widow asserts that as she is the only totally dependent person on the deceased employe, she is entitled to full compensation to the exclusion of the father, who was only partly dependent on his son. She says that the whole excludes the idea of a division or apportionment; that the wholly dependent, if any there be, takes the whole compensation; that one only partly dependent is not entitled to participate in the compensation allowed so long as there is one of the totally dependent class.

Can a person partly dependent upon the wages of a deceased employe participate in the compensation allowed under this act, when there is a totally dependent claimant? That is the question for determination in this case. The lower court held that the partially dependent father was entitled to participate with the totally dependent wife in the award in the proportion that his dependency bore to total dependency. The board of compensation held to the contrary. The widow prosecutes this appeal.

The extent of the liability of the employer to dependents of a deceased employe is fixed according to the class of dependents to which the claimant belongs, by section 4893, Kentucky Statutes, which reads: "(1) If

there are no dependents, as herein defined, there shall be paid in addition to the burial expenses and medical expenses, if any otherwise provided for herein, the further sum of \$100.00, payment to be made to the personal representative of the deceased employe.

“(2) If there are one or more wholly dependent persons, 65% of the average weekly earnings of the deceased employe, but not to exceed \$12.00 nor less than \$5.00 per week, shall be payable, all such payments to be made for the period between the date of death and 335 weeks after the date of accident to the employe, or until the intervening termination of dependency, but in no case to exceed the maximum sum of \$4,000.00.

“(3) If there are partly dependent persons, the payments shall be such part of what would be payable for total dependency as the partial dependency existing at the time of the accident to the employe may be proportionate to total dependency, all such payments to be made for the period between the date of death and 335 weeks after the date of the accident to deceased employe, or until the intervening termination of dependency, but in no case to exceed the aggregate of compensation on account of such death the maximum sum of \$4,000.00.”

Subsections 2 and 3 are the ones with which we are concerned.

Simplified, subsection 2 provides that in cases where there are one or more wholly dependent persons, the company shall be liable for 65% of the average weekly earnings of the deceased employe; and subsection 3 provides that if there be no totally dependent persons the amount recoverable shall be only such part of what would be payable for total dependency as the partial dependency, existing at the time of the accident to the employe, may be proportionate to total dependency. This section fixes the amount for which the insurer is liable, and does not designate the dependents who are to receive the same, for it will be noted that the section does not say to whom the compensation shall be paid as between dependents, but only that 65% of the average weekly wage of the deceased employe “shall be payable;” that is, the company shall be liable for said amount when fixed by the board.

It has often been held that where there are two or more wholly dependent persons, the allowance shall be equally distributed between them. *Rossi v. Standard Oil*

Co., 2nd Cal. I. A. C. Dec. 307; *Moran v. Rogers & Haggerty, Inc.* N. Y. App. Div., 168 N. Y. Sup. 410; *Bushe v. Whitehead & Kales Iron Works*, 194 Mich. 413, 160 N. W. 557.

So also has it been decided that where there are several partially dependent persons, but none totally dependent, each shall share in the fund awarded in the proportion that his partial dependency bears to total dependency and the distributable fund, but no matter how large the number of dependents, the total sum of their dependency can not exceed 65% of the average weekly earnings of the deceased employe. *Anderson v. American Straw Board Co.*, 1st Conn. Comp. Dec. 11 (affirmed by Supreme Court); *State Ex rel. Ernest Fleckenstein Brewing Co. v. District Court, Rice County*, 134 Minn. 324, 159 N. W. 755; *In Re Pagnoni*, Mass. 118 N. E. 948, *Dosker's Compensation Law*, 1917 edition, sections 164-181.

The act contains a provision (sec. 4909 Kentucky Statutes), for the payment of the entire award to one dependent for the benefit of all dependents entitled thereto, if the board so directs. This is intended to cover cases where a parent and a child or children are dependents. Generally the board will direct that all payments be made to the parent for the use and benefit of the parent and the several dependent children in accordance to the dependency of each; and their respective claims on the deceased for support. However, it has been held by the New Jersey court that where the deceased employe left a wife and several minor children, all totally dependent upon him for support, and one of the dependent children was by a former wife, the whole amount should not be paid to the widow, but it should be divided and paid one part to the widow for her use and that of her own children, and the balance to the guardian of the stepchild, according to the dependency of each, it being made to appear that the best interest of the stepchild would thus be served.

Why then should not the partially dependent share proportionately with the totally dependent in the ratio of his dependency to total dependency? We think he should. If this is not allowed, the legislative purpose fails in large part. The reason is not far to seek. The legislation out of which this system arose is founded upon the idea that all loss or depreciation of man power, like that of machine or material, must be charged to the industry in which it occurs, as a part of the cost of pro-

duction; and the loss distributed to and absorbed by the community as the ultimate consumer of the product of the enterprise. If a machine is worn out or broken, it is properly charged as a part of the cost of production and those who buy and use the product of the factory, or other plant, distribute and absorb the commercial shock. Why should not the same process be pursued with respect to the depreciation or destruction of the man power employed in the same plant? Why make the unfortunate man bear all the burden of the accident when he is a victim of circumstances and conditions over which he has little control?

The underlying purpose of the system is to provide support and maintenance for those who were dependent totally or partially upon the deceased employe, and thus save them from want, and the public from a charge. Dosker's Compensation Law, sec. 164. If the employe was, in his lifetime, contributing to the support of more than one dependent of different degrees, why should his death work a preference in favor of one or of a single class to the exclusion of all others, provided they all come within one or the other of the classes named in the act? To so hold would often work great hardship where the dependent, though included in subsection 3, was in fact 90%, or more, dependent but not wholly so. Moreover, it would often, as in this case, give the sole total dependent much more than she received in the lifetime of the earner. The widow in this case would receive more from compensation, under the act, than from decedent's earnings while taking from the partial dependent the little he formerly enjoyed. This was never intended. But if dependents be allowed to share in the award made by the board in the proportion of the dependency, the cardinal purpose of the act will be fulfilled while no violence will be done to the letter thereof.

Unless the statute expressly provides otherwise partially dependent persons may participate in the award with total dependents. *Corpus Juris Workmen's Compensation*, Supplement, page 56; *Robinson v. Anon*, 6 W. C. C. 117; *Boyd on Workmen's Compensation*, sec. 498.

The text of our statute does not provide otherwise, but rather, when the whole act is considered together, fosters the idea that the two classes of dependents shall share in the benefits at the same time and in proportion to their dependency; and this appears to be not only a sound rule but the fair and just one.

The compensation allowed to several partial dependents should be in proportion to the degree of dependency of each to total dependency, and where there are both total and partial dependents the award should be distributed in the same ratio, upon the average, employed by the deceased employe; that is to say, if the deceased was earning \$10.00 per week, and used 35%, or \$3.50 of it, to support himself, there was left, as now, 65% of his weekly wage which was distributed between the dependents. He had a totally dependent wife and a partially dependent father; he gave to the wife for her support \$4.00, and to his father \$2.50. Should the ratio now be changed simply because of the death of the earner? Is there any sound reason why the father should be wholly cut off from support when the fund available is practically the same? We can find none.

The board should award compensation in the ratio of dependency whether there be partial dependents only, or some totally and others only partially dependent. The judgment of the trial court, allowing compensation to the partially dependent father and remanding the cause to the board of compensation to ascertain and fix the degree of dependency of the father and to apportion the award between the two dependents, is affirmed.

Judgment affirmed. Whole court sitting.

Bennett, et al. v. Owen, et al.

(Decided February 11, 1919.)

Appeal from Crittenden Circuit Court.

1. **Infants—Sale of Land of Infant Under Statute.**—In an action brought to obtain a sale of real property, inherited by infants from their father, to pay debts owing by the estate of the latter; and, also, to settle the estate, the proceedings must strictly conform to the provisions of Civil Code, sections 428-489.
2. **Infants—Sale of Land of Infant Under Statute.**—Where in an action for the sale of infants' real property for the payment of the debts of an ancestor and to settle the latter's estate, the judgment ordering the sale of the real property failed to fix or declare the amount of the debts, determine whether the property was or not divisible, or to provide, in case a sale of the whole should be necessary to pay the debts, what disposition should be made of the

surplus proceeds, if any, arising from the sale; and at a sale subsequently made of the property by the court's commissioners, more of it was sold than required to pay the decedent's debts, such judgment and the sale made thereunder were and are void as to the infants, and, by reason thereof, subject to collateral attack in an action brought by them to recover the land of the purchaser at the decretal sale and his vendee.

MILLER & MORSE for appellants.

JOHN A. MOORE and JAMES A. MOORE for appellees.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

W. L. Bennett died January 3, 1908, in Crittenden county, intestate, survived by his wife, Julia E. Bennett, and three children, Carrie Frances Bennett, Henry Walton Bennett, and Emma Crystal Bennett, all of whom are infants under twenty-one years of age. The widow, in 1915, married J. E. Emery. W. L. Bennett owned at the time of his death three lots in the town of Dycusburg, and a two hundred acre tract of land on the waters of Livingston creek and the Cumberland river, one hundred acres of which, including the improvements, was shortly after his death, allotted to his widow as dower. Shortly after W. L. Bennett's death the widow, by an order of the Crittenden county court, was appointed and duly qualified as the statutory guardian of each of the three infant children above named, in which capacity she is still acting. About the same time one H. A. Haynes, by an order of the Crittenden county court, was appointed and duly qualified as the administrator of W. L. Bennett's estate.

W. L. Bennett left a small personal estate, which went into the hands of the administrator following his appointment. As there were some debts owing by the estate and the personal property was insufficient to pay them, the administrator brought an action in the Crittenden circuit court under sections 428-439, Civil Code, to obtain a sale of the real estate left by the decedent, or enough thereof to pay the debts and also for a settlement of the estate, the widow and children being joined as defendants, the former in her capacity of widow and as statutory guardian for the children. The cause was referred to the master commissioner to report the assets and liabilities of the estate, and he later filed a report which showed the indebtedness to be \$611.14, and that the cost of sale and effecting the settlement would prob-

ably amount to \$175.00; and further, that there was no personal property to be applied to the payment of this indebtedness.

It does not appear from the record that the report was excepted to or confirmed; but following the filing of same the court entered judgment declaring necessary a sale of the real estate for the payment of the decedent's debts, and costs of the action, and directing a sale of a sufficiency of the real estate for that purpose, the whole of which is accurately described in the judgment, which excluded from the sale the one hundred acres of land previously allotted the widow as dower. The judgment, however, does not state the amount of the debts, but does recite that there shall be included in the costs of the action and paid out of the proceeds of sale, \$100.00, allowed as a fee to the attorney of the administrator.

Acting under the authority conferred by this judgment the master commissioner advertised and sold at public outcry the whole of the real estate left by the decedent, except the widow's dower. The town lots were sold first and brought in the aggregate \$365.00. The land, exclusive of the dower, was then sold in gross, bringing \$1,035.00, the appellee, Henry Owen, being the purchaser. The sale was reported to and confirmed by the court, and by the court's order a deed was made through the master commissioner conveying the land to the appellee Owens, purchaser, who thereafter sold and, by deed, conveyed it to the appellee, William Griffin, who is now in possession of it. It will be seen from what has been said that the land purchased by Owen at the decretal sale and for which he paid only \$1,035.00, contains 118 acres of fertile bottom land; and further, that although there were but \$611.14 of debts owing by the estate and \$175.00 costs, making a total indebtedness of \$786.14, there was realized from the sale of the real estate \$1,400.00, or \$613.86 more money than necessary to pay the reported debts. Looked at from another angle, we find that upon crediting the indebtedness of the estate, \$786.14, by the \$365.00, realized from the sale of the town lots, there was but \$421.14 of indebtedness left; yet for this there was sold a tract of 118 acres for \$1,035.00, which was \$613.86 in excess of the amount required to complete the payment of the debts.

The infant appellants, children and heirs at law of W. L. Bennett, deceased, suing in their own right, by their statutory guardian and also a next friend, brought

the present action in the Crittenden circuit court against the appellees, Owen and Griffin, seeking to recover of them the 118 acres of land purchased at the decretal sale in the former action by Owen and sold by him to Griffin; and also to recover of them the rental value of the land for the years they have had it in possession. The petition sets forth the facts relating to the bringing of the action by the administrator, the rendition of the judgment therein, and the sale of real estate made thereunder, substantially as they are recited in this opinion. It is alleged in the petition that the judgment in that action, the sale thereunder of the land in question and its purchase by Owen, are void, as are the deeds attempting to convey it, made by the master commissioner to Owen and by Owen to Griffin, because there was more land sold in the action than was necessary to pay the debts against the estate of W. L. Bennett, deceased, and the court was without jurisdiction to sell more than enough of the real estate than was necessary to pay the decedent's debts. Furthermore, that the judgment sale and subsequent conveyances are void, because the judgment of the court did not fix or name any sum as indebtedness of the estate of W. L. Bennett, except a fee of \$100.00, allowed therein to the administrator's attorney.

Appellees filed a general demurrer to the petition which the circuit court sustained. Appellants then tendered and offered to file an amended petition which the court refused to permit to be filed. Appellants excepted to the court's ruling in sustaining the demurrer to the petition and rejecting their amended petition; and refusing to plead further, their petition was dismissed. From the judgment manifesting these rulings this appeal is prosecuted. The amended petition, not permitted to be filed, was by proper order made a part of the record for the purpose of appeal.

The facts alleged in the petition being admitted by the demurrer must be taken as true; it is only our duty therefore to determine whether the petition states a cause of action. For very sufficient reasons the judgment in the action brought by the administrator and sale thereunder must be held void. According to the averments of the petition, which are admitted by the demurrer, the judgment does not show the indebtedness of the estate nor declare the real estate indivisible, and no order was ever entered in the case confirming the commissioner's report showing the indebtedness. In addition, the judg-

ment made no provision respecting the disposition to be made of the surplus proceeds arising from the sale of the real estate, in the event it was found necessary to sell more of it than would pay the debts. As there were 200 acres of land belonging to the estate, saying nothing of the town lots, the court should have judicially known and declared it divisible, and by the judgment directed that only enough of it to pay the debts be laid off and sold for that purpose. As it was, the commissioner, without offering for sale a less quantity from that part of the land, not included in the dower, sold the entire 100 acres, merely announcing at the time that he would sell 100 acres "off the south side running the line due east and west from the river to a point in dower line so as to make 100 acres off the south side of same;" and the land thus designated, which included 118 instead of 100 acres, was sold. It is not to be overlooked that the action was one to sell the real estate of infants for the debts of the ancestor, from whom they inherited it, as well as to settle the latter's estate. So the proceedings were governed by section 489, as well as section 428, Civil Code. In *Elliott v. Fowler*, 112 Ky. 376, and the numerous cases therein cited, we held that a judgment for the sale of an infant's real estate and the sale made thereunder, are void, unless all the provisions of the statute authorizing the sale are strictly complied with; and that under Civil Code, section 489, in an action to settle an estate and sell an infant's land for debts of the decedent, a judgment for the sale of the land without ascertaining or fixing the amount of the indebtedness, as well as the sale made thereunder, were void as to the infant, to the extent that more land was sold than was necessary to pay the debts. Without commenting in detail on the several authorities cited in the opinion, it is sufficient to say that they as well as the following cases, *Crutcher v. Rodman*, 118 Ky. 506, and *Carter v. Crow*, 130 Ky. 41, decided since *Elliott v. Fowler* was decided, all adhere to the conclusion expressed therein. As the judgment and sale in question are both void appellants have the right to attack them as here attempted; and if the facts alleged in the petition are established by proof, they will be entitled to the relief demanded.

As the question is not before us, we do not now pass upon the equities that may arise in behalf of appellees, if upon the final hearing the circuit court should adjudge appellants entitled to the land. In that event, as appel-

lees were purchasers in good faith, they should be returned the consideration paid by Owen for the land at the decretal sale; but, as stated, that question, as well as the question of rents claimed by appellants and whatever other equities may be presented in behalf of the parties, will properly be adjusted on the return of the case to the circuit court and following the filing of appellees' answer. Upon the return of the case appellants should be permitted to file the amended petition heretofore rejected by the court, as it merely sets out with greater particularity facts already alleged in the petition that are essential to a statement of the cause of action.

For the reasons indicated the judgment is reversed and cause remanded with instructions to the lower court to overrule the demurrer to the petition and for further proceedings consistent with the opinion.

Gay, et al. v. Gay, et al.

(Decided February 11, 1919.)

Appeal from Clark Circuit Court.

1. Wills—Inequality of Disposition of Estate.—Proof of inequality of disposition among the objects of a testator's bounty, does not invalidate a will, unless fortified by evidence, proving incompetency, of the testator, or the existence of undue influence exerted upon him.
2. Wills—Distribution of Estate.—A testator, who is mentally competent, and not controlled by undue influence of another, may dispose of his property, as he chooses, and may select between the natural objects of his bounty, or he may discard them, and dispose of his estate to other objects.
3. Wills—Dreams—Influence of.—Proof, that a testator has, in previous years, had dreams, the interpretations of which, by himself, he obeyed, will not invalidate a will made by the testator, unless it appears, that he was acting under the influence of a dream, in the testamentary act.
4. Wills—Undue Influence—Burden of Proof.—The burden of proof is upon one, who charges, that a will was the product of undue influence, and while like fraud, the one exerting it, usually does so, secretly, and surreptitiously, there must still be some evidence of it, and if there is none, the charge fails.

PENDLETON & BUSH and BENTON & DAVIS for appellants.

ALLEN & DUNCAN, BEVERLY R. JOUETT and MAURY TEMPER for appellees.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

This action arose from a contest of the will of Lizzie H. Gay, who died in Clark county, in the year, 1917. She was a widow, about sixty-eight or sixty-nine years of age, at the time of her death, but the evidence does not make it appear, how long she had been a widow, further, than fifteen or sixteen years. She was the mother of two sons, one of whom Benjamin P. Gay, died in the year 1905, leaving a widow, and three children. The three children of Benjamin J. Gay, the elder of whom is now twenty-four years of age, and the others, twenty and seventeen, respectively, are the contestants of their grandmother's will. The other son of the testatrix, is Jacob D. Gay, one of the contestees. He is married, and has a son, Jacob D. Gay, Jr., who is seven or eight years of age, and also, one of the contestees. Jacob D. Gay, Sr., has always made his home with the testatrix, and Gatewood Gay, made his home with her, from the spring of the year, 1913, until her death. His brother and sister, have made their home with their mother, in Lexington, Ky. The will of testatrix, was executed by her, in Lexington, Ky., on the 16th day of August, 1916. A codicil to it, altering it in a minor particular, as to the disposition of nineteen acres of land and increasing a devise to the Kentucky Female Orphan School, from \$2,500.00 to \$3,500.00, was executed, at her home, on February 6, 1917. The contestants owned, by inheritance from their father, about 105 acres of land, of the value of \$200.00 per acre, subject to the dower right of their mother. They were, also, owners of one-half of a tract of about four hundred and fifty acres of valuable lands; their uncle, Jacob D. Gay, being the owner of the other undivided one-half. They were the owners of very little personal property, and the testatrix had, shortly after the death of their father, placed two valuable tracts of land, in the hands of a trust company, with the direction, that the proceeds be applied to the maintenance and education of her grandchildren. After Gatewood Gay, became grown, she put these lands, in his control, for the same purpose. When the testatrix died, she was the owner of about eighteen hundred acres of very valuable lands, and about thirty-one, or thirty-two thousand dollars' worth of personal property. By her will, she devised to her son, Jacob D. Gay, Sr., the home, where he and she and Gatewood Gay lived, consisting of nearly one

hundred and sixty acres, and a sufficiency of the lands adjoining, which he might select, to make the home place consist of three hundred acres. She, also, devised to him, a tract of nineteen acres of land, in another tract. To the contestees, jointly, she devised two farms, known as the Allen and Shackelford lands. To the contestant, Elizabeth Gay, her granddaughter, she devised a tract of six or seven acres, and a house and lot, in Winchester, Ky.; to Jacob D. Gay, Jr., she devised a house and lot, in Winchester. The residue of her lands, she devised an undivided one-half to her son, Jacob D. Gay, and the other one-half to the contestants, jointly. She provided, however, that these lands, should be divided by acreage and not by value, and that the division, should be made by her son, Jacob D. Gay. Jacob D. Gay was to have a fee simple title to one-fourth of the lands devised to him, the one-fourth to be selected by him, by acreage and not by value. The other three-fourths, he was to have a life estate in, with the power to devise same by will to any of his own descendants, or to any of the contestants, but, if he should die intestate, then the lands should go to his own descendants, if any, and if none, then to the contestants, to be held and enjoyed by them, as the other lands devised to them. The lands to be received by the contestants, under the will, they, respectively, were given a life estate in them, with remainder to their children, and if none, surviving, then, to each other, or to their surviving children, and if none, then to Jacob D. Gay, and his heirs. Jacob D. Gay was made a trustee for the contestants, to receive, hold and manage the property devised to them, until they, should, respectively, become married, or thirty years of age. If Jacob D. Gay should refuse to act as trustee, then the Security Trust Company, of Lexington, was nominated as the trustee. Jacob D. Gay was nominated as executor of the will, without security, with power to divide the lands devised, in accordance with the provisions of the will, and to execute the proper deeds to the devisees, or he, if he chose, was authorized to institute suit, in the courts, to have the division made. Of her personal estate, she devised ninety shares of bank stock, worth \$18,000.00, to the contestants, and to Robert Fisher and Martha Smith, each, \$75.00, and the remainder, she devised to Jacob D. Gay. She, also, devised to the Female Orphan School, the sum of \$3,500.00 as above stated. A few days before her death, she made a memorandum, which, however, was

never signed as a will, but the provisions of same, seem to have been carried out, by which she gave to Augustus Gay, one of the contestants, three brood mares, and to Elizabeth Gay, a sealskin coat, and certain articles of jewelry, including a diamond ring, and other small devises. A year or more previous to her death, she had given her son, Jacob D. Gay, one hundred and fifty-nine shares of bank stock, estimated to be of the value of \$200.00 per share.

The three grandchildren, becoming dissatisfied with the disposition, which their grandmother had made of her property, by her will, instituted a contest, and upon a trial, in the circuit court, after the contestees proved the due execution of the will, and after hearing all the evidence offered by the contestants, touching the invalidity of the will and codicil, the court sustained a motion for a directed verdict, in favor of the contestees, and under a peremptory instruction, the jury found the will and codicil to be the last will and testament of testatrix, and the court so adjudged.

The contestants have appealed, and the only question before us, is whether there was any evidence offered, which required a submission of the cause to the jury. The contestants sought to set aside the will upon the usual grounds, of a want of testamentary capacity, in the testatrix, and that she was unduly influenced, by some other person or persons, in the execution of the will. It will not be possible, in an opinion, to recite all the circumstances offered as evidence, nor will it be profitable to discuss them, but, we will attempt to advert to the main contentions of contestants. The rule of almost universal application, and acceptance to be applied, in determining, whether a testator has testamentary capacity, is, that he must have mind and memory, to know his property and its value; to know the natural objects of his bounty and his duty to them; to make a rational survey of his property and to dispose of it, by his will, according to a fixed purpose of his own. *Rasdale v. Brush*, 31 R. 1138; *McDonald v. McDonald*, 120 Ky. 211; *Woodford, etc. v. Buckner*, 23 R. 627; *Lancaster v. Lancaster*, 27 R. 1127; *Wise v. Foote, etc.*, 81 Ky. 10; *Murphey's Extr. v. Murphey, etc.*, 23 R. 1460; *Walls, etc. v. Walls, etc.*, 30 R. 948; *Bradshaw v. Butler*, 30 R. 1249. The proof, offered by contestants shows, that the testatrix was a woman of fine business sense and acumen; that she had, by inheritance, received eight or nine hun-

dred acres of land, much of it entailed, and that she had so managed her affairs, that she had, at her death, become the owner of a thousand acres, in addition to her inheritance, and the personal property mentioned; that she made her own contracts, and when necessary, reduced them to writing, with her own hand; that she managed and controlled all of her affairs; that she had a strong and vigorous mind and will, and it continued vigorous and commanding, until her death. She was afflicted with no special physical weakness, but, about two or three years before her death, she was compelled to undergo a surgical operation, and after that time, remained more closely, at her home, than formerly. It is not shown, that in making her will or the codicil thereto, that she consulted with any one about its terms or conditions, nor was her son present, on either occasion, though it appears, that she informed her son, and her eldest grandson as well, of certain of the provisions of the will. The contestants state, in their testimony, that she knew all about her property and its value; that she knew all of her children and grandchildren well; that she could not be controlled by any one to do what she did not desire to do; but, they are of opinion, that she did not know, nor appreciate her obligations to the contestants, which opinion seems to be based, entirely, upon the fact, that she did not devise as much of her property to them, as she did to her son. The parol evidence, when applied to the terms of the will, proves, that she gave to her son, very much more property, than she gave to the contestants, altogether, and it is insisted, that this amounts to a gross inequality, among the natural objects of her bounty, and is evidence, conducing to prove, that she did not appreciate her duty to the grandchildren. That in order to have testamentary capacity, one must have such sensibilities as will enable him to know what he owes to the natural objects of his bounty, there is no doubt, *McDonald v. McDonald*, 120 Ky. 211, but, mere inequality, alone, in dispositions of property to the natural objects of a testator's bounty, has never been held to be evidence of a want of knowledge, of the duty of the testator to them. A testator, if acting from his own will and is mentally competent, has a choice of the objects of his bounty, and the extent to which he will bestow his bounty upon them. *Williams v. Williams*, etc., 90 Ky. 28. If mentally competent and not affected by an undue influence, he may discard all the natural objects of his bounty, and dis-

pose of his property to others, or to other objects. Any other rule would destroy the testamentary power, and revoke the right of a testator to dispose of his property, according to his own will, a right, which is conceded to him, by all the authorities. Apparently gross inequality and unreasonableness in the disposition of property, by will, when combined with corroborating evidence of want of capacity or undue influence exerted upon the testamentary act, is entitled to influence, according to its degree, and is competent evidence as to the quality of testator's power of disposition, but, inequality of disposition, alone, does not prove anything. *Walls v. Walls*, etc., 99 S. W. 969; *Kevil v. Kevil*, 2 Bush 614; *Zimlich, etc. v. Zimlich, etc.*, 90 Ky. 657; *Lucas v. Carmen*, 13 Bush, 650; *Hildreth v. Hildreth*, 153 Ky. 603.

It is insisted, that there was proof of want of mental capacity, and of an undue influence exerted upon the testatrix, which will fortify the evidence of inequality of disposition. The evidence, clearly shows, that the testatrix knew and appreciated her duties to the contestants. She was always kind and affectionate toward them; she made them presents, and kept them at her home, for considerable periods of time, and set apart, in the hands of a trustee, during their extreme youth, lands, the rent of which was worth \$1,000.00 per year, for their maintenance; she took the contestant, Gatewood Gay, to her home for several years before her death; loaned him money, and furnished him lands to graze and cultivate, and by her will, gave him and his sister and brother, personal property, worth \$18,000.00 and lands of the value of more than \$100,000.00. The fact, that she saw fit to devise to her only son, who had always lived with her, much more property, than she devised to contestants, did not prove, that she lacked, either mental capacity, or that she was moved by an undue influence, when it is considered, that it was her legal right to make such a disposition. It is complained, that the testatrix placed contestants' property, into the hands of a trustee, and entailed it. She provided for a trustee until they should marry, or become thirty years of age, and there is nothing to indicate, that this was not a just disposition. She gave her reasons for this, to Gatewood Gay, and while she may have made a mistake, it was not a delusion, but founded to some extent in fact. The fact, that a testator placed the devised property, in entail, has never been considered evidence of want of capacity, but, rather the

normal attitude of those few, who are ever able to accumulate more than the necessities of a living, and who desire to control all they have, while living, and as long after death, as they can, mixed with a want of faith in the devisee to hold on to what is given him, which fear is frequently justified.

It was proved, that more than twenty years before her death, her son, Benjamin, was afflicted with rheumatism, and that she represented, that she had a dream, in which the words, "pile on fagots" appeared, and she interpreted this to mean, that she should heat his room, with a strong fire, which she did, and he became well. After his death, in 1905, she dreamed, that he appeared to her with a bridle in his hand, and said, "wash your reins;" that she interpreted this to mean, that she should take control of the lands, which she had placed in the hands of his widow, to assist in the maintenance of her family, and put them, in the hands of a trust company, for the same purpose, which she did. In 1905, when her son, Benjamin, died, she had a dream, in which the date of the birth of her son Jacob, appeared in golden letters, and she interpreted this to mean, that she should be comforted, as she yet, had something to look forward to and live for. About 1907 or 1908, her son, Jacob, was sick in a hospital, when she had a dream, in which she washed her hands, twice, and then a third time, and they became clean, and she interpreted this to mean, that he was going to recover. In 1906 or 1907, her son, Benjamin, appeared to her in a dream, and advised her to put her tobacco crops, in the pool, which she did. In 1914, when the war, between France, Russia, England and Germany, Austria and Serbia was fairly begun, she dreamed, that she saw a bear pressing against a door, and that the door fell. This, she interpreted, to mean, that the Russians were going to win the war. An alienist testified, that in his opinion, a person having dreams, such as those, and acting upon them, was insane. The hypothetical question propounded to the alienist did not contain a statement of all the facts, in regard to testatrix, of which there was some evidence, conducing to prove, and the question embraced some assumptions of which there was no proof, and for that reason, his answer, was not competent evidence, but, the cross-examination somewhat supplied the deficiencies of the question, and the answer will be treated as competent. It will be observed, that these dreams, were from ten to twenty years before

the will was made, with the exception of the one about the bear. The interpretations, which the testatrix is proved to have placed upon these dreams, are far-fetched and without any kind of reason, but, the proof fails to show, that these dreams, or any dream, had any influence or was present in the testamentary act, and so far removed from it in point of time, that it can not be inferred, that they exerted any influence upon it. It seems, that if a testator should have a dream, and should implicitly act upon its suggestion, and be controlled by it, in the making of a will, and his freedom of disposition be, thereby, destroyed, the will would not be the free and untrammelled act of the testator, but, it would be in the nature of one acting under an insane delusion and therefore invalid, but, as in this instance, there is no kind of connection between the dreams and the making of the will or the disposition of property made by it, and in addition thereto, the evidence abundantly, showing, that the testatrix, was of absolutely sound mind, and no contention to the contrary, the evidence of the dreams, does not prove anything to invalidate the will. *Williams v. Williams*, 23 S. W. 789; *Raisen v. Raisen*, 148 Ky. 116; *Schildnecht v. Rompf's Ex's*, 4 S. W. 325; *Coffey v. Miller*, 160 Ky. 415; *Purdy's Admr. v. Evans*, 156 Ky. 142. The kind of insanity about which the alienist deposed, not being of a kind, which will invalidate a will, his testimony does not make the necessary evidence to entitle the case to go to the jury. As stated, in *Crump v. Chenault*, evidence is "something of substance and not vague, uncertain or irrelevant matter, not carrying the quality of proof, or having fitness to induce conviction." *Clark v. Young*, 146 Ky. 377. In other words, the scintilla rule does not mean the making of something out of nothing. Mere conjecture or suspicion, is not sufficient to constitute evidence.

It is ingeniously and ably contended, that while no circumstances in evidence, taken singly, is sufficient to amount to evidence conducing to prove, that the testatrix acted in the making of her will, under an undue influence exerted by Jacob D. Gay, or his wife or some other, that the proof of all the facts and circumstances in evidence, together, amount to evidence, from which an undue influence might be inferred. *Walls v. Walls*, *supra*. It will be remembered, that an undue influence sufficient to invalidate a will, must be an influence exerted over the testator, at some time or other, which continues at the

time of the testamentary act, of such potency, that the testator is constrained to do against his will, that which he would otherwise not do. The fact, that undue influence is like fraud, usually concealed by the party exerting it, and surreptitiously applied, more often than otherwise, is not overlooked, but, there must be some evidence, that such influence was exerted and existed. *Crump v. Chenault*, 154 Ky. 187; *Jones v. Beckley*, 173 Ky. 840; *Brent v. Fleming*, 165 Ky. 365; *Broaddus v. Broaddus*, 10 Bush, 299; *Cecil Exrs. v. Auheir*, 176 Ky. 198; *Turley v. Johnson*, 1 Bush 117; *Child's Extr. v. Cartwright*, 136 Ky. 505. The mere opportunity to exert an undue influence, is not sufficient, as the party accused, may have done so, or may not have done so. All the facts, in proof, taken together, do not make evidence tending to show an undue influence exerted upon the testatrix and that the will was the product of it, rather the contrary.

The judgment is therefore affirmed.

Shepherd v. Laviers.

(Decided February 11, 1919.)

Appeal from Floyd Circuit Court.

Injunction—Grantor and Grantee—Suit by Third Person to Quiet Title—Payment of Purchase Money Into Court—Right to Compel.—A grantor of minerals, under a deed containing a covenant of general warranty, who when sued by another to quiet his title to the minerals presented various defenses, and asked that his grantor interplead and defend the title, was not entitled to a mandatory injunction requiring his grantor to pay the purchase money into court pending the settlement of title.

WM. LANE, WM. DINGUS and WILLIAMS & JAMES for appellant.

J. C. HOPKINS and A. J. KIRK for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

This action was originally brought by Ben Hale against H. Laviers, to quiet his title to the minerals underlying a tract of land in Floyd county, and to enjoin Laviers from entering upon the land and removing the

minerals. In addition to denying Hale's title, Laviers pleaded *res adjudicata*, estoppel and other defenses. By another paragraph of his answer, which he made a cross-petition against Jacob Shepherd and wife, he alleged that they had conveyed the minerals to him by deed containing a covenant of general warranty, and asked that they be required to interplead and defend the title. He further alleged that he had paid Shepherd and wife the sum of \$4,891.80, in full payment for a perfect title; that prior to the institution of the suit, Shepherd and wife had on deposit the sum of \$6,300.00, including the \$4,891.80; that upon the institution of the action they unlawfully and fraudulently withdrew this deposit from the bank; that Shepherd and wife were each insolvent; that if it should be decreed that plaintiff, Ben Hale, was entitled to recover the minerals from defendant, and defendant should be evicted, defendant would lose the consideration paid to Shepherd and wife; that by reason of the fact that he had paid the money to Shepherd and wife for the sole purpose of securing a perfect title to the property, he was entitled to a lien upon the consideration paid; that if Shepherd and wife were permitted to withdraw said money from the bank, and hold, dispose of and use the same, great and irreparable injury would be suffered by defendant in the event that plaintiff, Ben Hale, should succeed in his efforts to oust defendant. He also alleged that he had no adequate remedy at law, and asked that a mandatory injunction be issued, requiring Shepherd and wife to pay the purchase money into court, to be held until the final disposition of the cause. The chancellor granted the relief prayed for and Shepherd and wife appeal.

It may be conceded, that pending a suit in equity or at law, an injunction may be granted to preserve the existing status of the property involved until a final settlement of the right or title. It may further be conceded that an injunction will lie at the instance of creditors and encumbrancers, such as mortgagees, chattel mortgagees, or mechanics' lienors, or to aid them in the enforcement of their claims, by restraining the removal, disposition or destruction of property, subject to their claims or encumbrances. 22 Cyc. 840; Phillips v. Winslow, 18 B. Monroe 431. But, these principles have no application to the facts of this case. Here, the property involved is the minerals and not the purchase money. Defendant is not seeking to set aside the conveyance to him on the

ground of fraud. He is merely asking for a recovery over against Shepherd and wife in the event that plaintiff, Hale, should establish his title to the minerals. The mere possibility that Hale might succeed is not sufficient to give defendant a lien on the purchase money paid to the Shepherds. Ordinarily, the arm of the chancellor cannot be used for the collection of an existing debt, but here we are asked to go further and compel the defendant's vendors to pay their money into court for the purpose of indemnifying the defendant against a loss which he might never sustain. While it is true that injunctive relief is a matter of growth, and the courts are continually finding new subjects for such relief, we are firmly persuaded that the facts of this case are not sufficient to authorize such relief. If such were the rule, then everyone liable to become indebted to another could be compelled to pay his money into court until the question of liability was determined. It follows that the chancellor erred in granting the relief prayed for.

Judgment reversed and cause remanded with directions to enter judgment in conformity with this opinion.

R. C. Tway Mining Company v. Tyree.

(Decided February 11, 1919.)

Appeal from Knox Circuit Court.

1. Master and Servant—Fellow Servants—Negligence.—Employees in control of separate coal cars in a coal mine and performing the duty of driving the mules by which they are hauled, are not fellow servants of other employees of the same master in control of like cars in the same coal mine and performing the duty of driving the mules hauling them; and if a servant in control of one of such cars and engaged in driving the mule hauling it, is injured by the negligence of a servant in control of another car and engaged in driving the mule hauling it, the master will be liable.
2. Master and Servant—Fellow Servants—Negligence.—The master will not be excused for negligence resulting in injury to one servant inflicted by another servant in the same department of service and engaged in like work, unless the servants are so engaged and situated as that each, by ordinary care and attention in the performance of his duties, may protect himself from injury resulting from the negligence of the other.
3. Master and Servant—Fellow Servants—Negligence.—Where the servant is injured by another servant of the same master, who is

not directly associated with him or in any degree subject to his control, or even advice, and against whose negligence he has no means of protecting himself, he may recover of the master damages for the injuries caused him by the negligence of such other servant, whether such negligence be ordinary or gross, and without reference to the position or place the servant causing the injury holds.

BLACK & OWENS for appellants.

J. D. TUGGLE and GOLDEN & LAY for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellee, Walter B. Tyree, recovered of the appellant, R. C. Tway Mining Co., in the court below, a verdict and judgment for \$700.00, by way of damages for personal injuries received by him in 1915, while in the latter's employ as a mule or car driver in its coal mine; the injuries resulting, as alleged, from its negligence or that of one of its servants, appellee's superior. The appellant asks a reversal of the judgment on the following grounds, viz.: (1) That the trial court erred in instructing the jury; (2) that a peremptory instruction directing a verdict for the defendant should have been given; (3) that the verdict returned by the jury is excessive in amount, and unsupported by and flagrantly against the evidence.

It appears from the evidence that appellee was one of several servants in appellant's employ charged with the duty of removing loaded coal cars, hauled by mules, from the rooms of the mine to a side track at the mouth of the mine where they were left, and the mules hitched to empty cars, standing on an adjacent track, to be hauled back to the various rooms of the mine and there loaded with coal. Each mule and car was controlled by the driver in charge thereof, whose duty it was to so operate same as to prevent collisions with the mules and cars of other drivers in the mine. In moving a car the driver usually sat on the front of it immediately behind the mule, from which position he was expected to control the movements, both of the animal and car. For the driver to be so seated in his car seems to be a custom in mines where coal cars are hauled by mules. At any rate, it was, according to the evidence, the custom in appellant's mine at the time appellee received his injuries.

The injuries were received in the following manner: one Patton Miller, also a mule driver in appellant's mine,

after hauling a loaded car to the side track and unhitching the mule turned his back to the animal for the purpose of coupling the car to other loaded cars standing on the same track, whereupon the unsecured mule left the side track, went over to the track upon which he had just hauled the loaded car, and proceeded to walk down it toward the interior of the mine.

When Miller discovered the departure of the mule he set out to overtake and capture it, which served to increase the latter's gait and caused it to collide with the mule attached to a loaded coal car which appellee happened at the time to be driving over the same track from the interior of the mine to the side track for loaded cars near the entrance. As appellee was seated on the front of the car he was hauling, the collision of the escaped mule with the one he was driving caused the latter to fall back upon him, pinion him to the car, and thereby produced his injuries.

We will first consider the reasons urged in support of appellant's contention that the trial court should have peremptorily instructed the jury to return a verdict in its behalf. It is insisted that the peremptory instruction was authorized because appellee's injuries resulted from his contributory negligence; or if not so caused, that they resulted from negligence of a fellow servant, both of which grounds of defense are relied on in the answer, following that pleading's denial of the negligence charged to appellant by the petition. The only evidence cited by appellant's counsel as tending to show appellee guilty of contributory negligence, was his admitted failure to stop at and look beyond an air curtain, immediately before his mule collided with that of Miller, for the purpose of ascertaining whether the track at the point of collision was free of obstruction. It appears from the evidence that there was, within twenty or thirty feet of the place of collision, a cloth curtain across the main entry of the mine in use for keeping fresh air in certain inner side entries where miners were at work, and that appellee had to pass under or through this curtain in hauling the cars in and out of the mine. This the evidence shows he did when his injuries were sustained, and at all other times, as it was done by other drivers; that is, by causing the mule, himself and car to pass under the curtain, which could easily be forced up from its hanging position to admit such passage, and as easily fall or slide back over the mule, driver and car as the

passage was being effected and thereafter resume its accustomed hanging position for closing the entry.

Appellee testified that he sat on the front of the car in passing under the curtain because he could in that way obtain a quicker and better view of the track beyond, better control of the mule and prevent the catching of the curtain on the car. He admitted his position on the car required a momentary ducking or turning of his head in passing under the curtain to prevent the extinguishment of the light of the miner's lamp attached to the front of his cap, but said that such moving of the head is so quickly done it can not cause any material diversion of the mind or vision of the driver from the mine track ahead of him; furthermore, that if he had stopped at the curtain, the mule of Miller was so close to the curtain he would have been upon him before he could have looked beyond it or taken any step to protect himself or mule in his control from the collision. We are unable to see in this practice of appellee, followed as usual on the occasion of his injuries, or in his failure to stop his mule and car before passing the curtain and raise it to ascertain the condition of the track beyond, such contributory negligence as authorized a peremptory instruction directing a verdict against him.

There is in the record no direct evidence that appellant had a rule, printed or otherwise, requiring its mule drivers to stop upon reaching an air curtain and raise and look beyond it to see that the mine track was safe for use. The mine boss testified that each mule driver in appellant's mine was instructed to look to his own safety and that of his mule and car; and to see to it that his mule was not permitted to run into another mule or car; and further, that he (the boss) had instructed some of the drivers to stop at the air curtain before driving through and see that the track beyond was clear. He admitted, however, that appellee was never instructed by him to observe this precaution. But notwithstanding the absence of a rule requiring the observance of this precaution by appellee, it was nevertheless competent for the jury to determine from the evidence whether he should have taken such precaution and whether his failure to do so, was such failure to exercise ordinary care for his own safety, as constituted negligence; and, also, whether, but for such negligence, he would not have been injured. This question was properly submitted to the jury by an instruction cor-

rectly defining and applying the law of contributory negligence. Guided by that instruction the jury, as was their province, decided this issue of fact adversely to the appellant's contention; and as there was evidence upon which to rest the decision, we are constrained to hold that appellee, in the matter of receiving his injuries, was not guilty of contributory negligence.

We think it patent that appellant can not here escape liability on the ground that appellee's injuries were caused by the negligence of a fellow servant. This conclusion we rest upon the fact that Miller, its employe, whose negligence caused appellee's injuries, was not a fellow servant of the latter.

We have repeatedly held that operators of separate cars, in a coal mine, are not fellow servants of other employes of the same master engaged in operating other cars; and that if a servant engaged in the operation of one of these cars, is injured by the negligence of a servant engaged in the operation of another car, the master will be liable; and this is true, whether the cars be hauled by mules, propelled by steam or electricity, or pushed by hand. *Elkhorn Mining Corporation v. Paradise*, 180 Ky. 572; *Cummins v. Sparks Co.*, 173 Ky. 803; *Harris v. Rex Coal Co.*, 177 Ky. 630. In the first of the cases cited, the plaintiff, while pushing a loaded car in a coal mine, was injured by the negligence of other employes of the master, by running against him other loaded cars being pushed by them. In the second case, the plaintiff, who was the operator of a car in a rock quarry, was injured by the negligence of other employes of the master in operating a similar car. In the third case, death resulted to a miner from the negligence of another employe of the master, who was associated with the decedent in operating coal cars.

The soundness of the rule announced in the cases, *supra*, is made manifest by the statement of the reasons underlying it, set forth in the opinions; notably that of *Harris v. Rex Coal Co.*, wherein the following excerpt from the opinion in *L. & N. R. R. Co. v. Brown*, 127 Ky. 73, is quoted with approval: "When the servant is injured by employes of the same master, who are not directly associated with him and with whom he is not immediately employed and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negli-

gence and carelessness he can not protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds."

The opinion also quotes with approval the following statement of the same doctrine found in *Louisville Ry. Co. v. Hibbitt*, 139 Ky. 43: "The fellow servant rule is invoked in many cases, but applied in few. This court is fully committed to the doctrine of what is known as the 'association theory,' or, in other words, the master will not be excused for negligence resulting in injury to one servant which is inflicted by a fellow servant, unless the servants are so engaged and situated as that each by carefulness and attention in the performance of his duties may protect himself from injury caused by the negligence of the person with whom he is working."

Appellee's injuries were obviously caused by the act of appellant's servant, Miller, in permitting the escape of the mule he was driving after unhitching it from the loaded car he had hauled to the side track. According to the evidence it was Miller's duty to maintain control of the mule, and, after unhitching him from the loaded car on the side track, to use ordinary care to keep him from going upon the track traveled by loaded cars coming out of the mine; as to permit such use of that track tended to obstruct it and endanger the safety of the straying mule, that of any other mule that might at the time be hauling a loaded car thereon, and the life of the driver in charge. The evidence shows that after unhitching the mule from the loaded car Miller left him untethered and unwatched, while he took time to couple his car to others then on the track, in doing which his position was such that he could not see the mule. It can not be told from the evidence how much time was consumed by Miller in making the coupling, but before it was completed the mule moved from where it had been left by Miller and when again seen by the latter, after the coupling of the cars was completed, the animal had gotten on the main track and was proceeding on it toward the interior of the mine when it collided with the mule driven by appellee; the collision occurring after appellee's mule and car had passed the air curtain and before Miller could catch the escaped mule. Proof of the foregoing facts and circumstances furnished some evidence of negligence on the part of Miller requiring the submission of the case to the

jury; and we are not prepared to say that the evidence was not of sufficient strength to support the jury's finding that Miller was negligent, and that his negligence caused appellee's injuries.

The above conclusion so effectually disposes of appellant's complaint of the alleged insufficiency of the evidence to support the verdict, as to render further consideration or discussion of it unnecessary. It follows from what has been said, that the refusal of the trial court to direct a verdict for appellant by the giving of the peremptory instruction asked by it after the close of the evidence, was not error.

Appellant's complaint of the instructions given by the trial court is two-fold. It is insisted (1) that they erroneously authorized a verdict for appellee if his injuries were caused by ordinary, instead of gross, negligence on the part of appellant's servant, Miller; (2) that they failed to advise the jury that the damages they might allow appellee should not include any amount for physical or mental suffering, loss of time or the impairment of his earning capacity, that may have been caused by an injury he sustained to the same arm before those complained of in the petition were received.

It will sufficiently answer the first objection to say that while it has frequently been held in this jurisdiction that a servant in order to recover of the master for injuries, not resulting in death, caused by the negligence of his superior in the master's service, must show that the negligence of such superior was gross, in its application this doctrine is confined by the modern trend of authority, especially the decisions of this court, to cases in which the servant is injured by the negligence of a superior officer who has immediate control of or supervision of him. As said in *L. & N. R. R. Co. v. Brown*, *supra*, "The reason of this rule is that the servant when he engages to work, undertakes that he will assume the ordinary risks incident to the employment, and will not hold the master liable for the ordinary negligence of those employes with whom he is engaged, whose actions and conduct he can observe and, if necessary, guard against."

When, however, the servant is injured, as was the appellee, by the negligence of another employe of the same master, who is not directly associated with him or in any degree subject to his control, or even advice, and against whose negligence he has no means of protecting

himself, he may recover of the master damages for the injuries caused him by the negligence of such other servant, whether, as further said in *L. & N. R. R. Co. v. Brown*, *supra*, "it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds."

It is patent from what has been said that in order to recover of appellant damages for the injuries he sustained by the negligence of its servant, Miller, appellee was not required to prove such negligence gross, but only that it was ordinary negligence, i. e., the failure to use ordinary care; and as the instructions given so advised the jury, they correctly expressed the law, and are, therefore, not open to the criticism of them indulged in by counsel for appellant.

Appellant's complaint of the instruction containing the measure of damages rests upon certain evidence as to previous injury sustained by appellee to the same arm that was injured in the mine. There was evidence to the effect that appellee's arm, injured in the collision with the mule, had more than a year prior to that accident been slightly injured in a fight or scuffle, which required some subsequent surgical treatment of the arm. But its recovery seems to have been complete, for he had been constantly at work in appellant's mine nearly a year when the arm was last injured. The last injury was followed by a surgical operation for the removal of the small bone, which, according to the testimony of the surgeon, gave some slight indication of being in a tubercular condition that might have had some connection with the first injury to the arm. But conceding this to be true and, also, that appellant might properly have been given a separate further instruction telling the jury that they should not allow appellee any damages for the first injury to his arm or for any aggravation of the last injury by the first, neither such an instruction nor any other on the subject of the measure of damages was asked by appellant, and the one given on that subject by the court, in language and meaning, excluded the allowance of any damages to appellee resulting from the first injury by confining the recovery to only such as were shown to have directly resulted to him from the last injury, and setting forth the several elements or items of damages properly recoverable under the pleadings, for that injury alone. As this instruction, though less elaborate in expression than it might have been made, was sufficient for the cor-

rect guidance of the jury on the question of damages, and appellant did not ask the further instruction on the measure of damages it now complains the trial court did not give, the failure of that court to give it is not reversible error.

Appellant's complaint of the amount of the verdict can not be sustained. For the practically total impairment of the use of the right arm, to say nothing of the physical and mental sufferings, loss of time, and the expense of cure, resulting from the injury causing such impairment, \$700.00 damages can not fairly be said to be excessive in amount.

We have found in the record no legal cause for disturbing the verdict of the jury; therefore, the judgment is affirmed.

Campbell, et al. v. Whisman, et al.

(Decided February 14, 1919.)

Appeal from Powell Circuit Court.

1. Homestead—Election by Widow.—In the absence of any assignment of dower or homestead, the law will presume that the widow elected to take that estate which was most beneficial to her and her children, and when the homestead fills that description, a number of years' occupancy by the widow without any such assignment will be conclusively presumed to be an election by her to take homestead rather than dower.
2. Homestead—Sale of Right by Widow—Effect.—Since the right of homestead of a widow in the land of her husband is not an estate, but only a right of occupancy, an attempted sale by her of such right conveys nothing and has the effect of forfeiting such right in favor of the owners of the land who have an immediate right of occupancy, and the attempted vendee becomes a hostile holder of the title as against them.
3. Limitation of Actions—Adverse Possession.—In such a case fifteen years' adverse holding will bar the right of the holder of the fee unless he was laboring under disability at the expiration of the fifteen years, which, if true, he has three years thereafter in which to file suit (Sec. 2506 Ky. Statutes), and not fifteen years from the time of the removal of such disability (Sec. 2525 Ky. Statutes).

A. F. BYRD, JOHN D. ATKINSON and A. D. STEWART for appellants.

C. F. SPENCER and B. D. BERRY for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

On January 26, 1883, John L. Whisman purchased by title bond only from William F. Baker about 43 acres of land in Powell county, Kentucky. He immediately moved upon the land and continued to live upon it with his wife and children (three of the latter being appellees) until 1887, when he died intestate. Shortly thereafter, and while continuing to reside upon the tract, the widow married one Townsend, by whom she had three children, the appellees, Oscar Townsend, Nellie Townsend and Stella Townsend Raines. One of the four surviving Whisman children, Mary Whisman, died in 1913 without descendants and her interest in the tract was inherited by her mother, Mrs. Townsend, who survived her, and upon her death, in 1916, that one-fourth interest was inherited by the three Whisman children and the three Townsend children jointly. Mrs. Townsend, with her second husband and all of her children, occupied the land after the death of John L. Whisman until March 27, 1897, when she and her husband attempted to sell it to Thomas Keen by each of them signing this statement written upon the title bond executed by Baker to her first husband: "I this day and date do bargain and sell and convey my land above to Thomas Keen and sign over my bond to the same, this March 27, 1897." Previous to that attempted sale Mrs. Townsend both before and after her second marriage exercised acts of ownership over the entire tract, which is conceded to have been worth then not exceeding \$250.00. Thomas Keen immediately took possession and lived upon the land until November 26, 1898, when he attempted to sell it to Less Starnes, himself and wife making a like endorsement upon the bond, and Starnes in the same way transferred the bond and sold the land to J. R. Campbell on February 10, 1899. Campbell took possession of the land and held it, claiming to own it, until January, 1915, when he died intestate leaving surviving him his widow and infant children, who are the appellants here and who were defendants below.

On January 30, 1917, this ejectment suit was brought by plaintiffs against defendants to recover possession of the land and damages for its detention, it being alleged that the children of John L. Whisman inherited the land from their father, and that the Townsend children inherited their interest in the manner before stated. The defendants denied the title of plaintiffs and alleged title in

themselves; they also relied upon the statute of limitations as a bar to plaintiffs' cause of action. Upon final submission, the cause having been transferred to equity by agreement and submitted to the court without the intervention of a jury, there was a judgment in favor of plaintiffs, and to reverse it defendants prosecute this appeal.

By a stipulation which is copied into the record and made a part of it it is agreed that each transferee paid full value for the land at the time of the respective transfers, and that they each took possession of it, holding and claiming it as their own until they parted with title, except Campbell, who, as we have seen, died in possession. At the death of John L. Whisman his youngest child was between eighteen months and two years of age, being nine years old when his mother attempted to sell the land to Thomas Keen. Whether she sold Keen any interest in the land is dependent upon the further fact as to the character of interest she held in it when she attempted to make the sale. There was never any assignment or attempted assignment of dower or homestead to Mrs. Whisman. At the time of her husband's death in 1897 she was entitled to either dower or homestead in the land, and under repeated decisions from this court she had a reasonable time after her husband's death to apply for and have assigned to her dower if she chose that estate in preference to homestead. She can not have both. *White v. Holder*, 118 S. W. (Ky.) 995; *Middletown v. Fields*, 142 Ky. 354; *Phillips v. Williams*, 130 Ky. 773, and *Carver v. Elmore*, 147 Ky. 521. These cases further hold, particularly the last one, that in the absence of an election by the widow between homestead and dower the court will elect for her that estate or right which would be the most beneficial to her and her children, and that after the lapse of a reasonable time it will be presumed that she elected to and did take the estate or right which was the most beneficial.

It is seldom that two cases are found as nearly parallel in their facts as are the facts of this case and those of the *Carver* case, *supra*. There the husband, Elmore, died in 1877, and his widow, without any assignment of dower or homestead, occupied the land until 1893, when she conveyed it by deed of general warranty to Carver, who occupied it until 1910, when the Elmore children filed suit against him to recover the land, together with damages by way of rents, waste, &c. The defendant in-

terposed the plea of limitations, but this plea was denied solely because it was conclusively shown by the testimony in the case that the defendant never claimed the land adversely to the Elmore children, but only claimed to have purchased the life interest of their mother and the right to use and occupy it during her life. Hence, in the opinion this court said: "The evidence to the effect that appellant (Carver) was only claiming the right to the use of his property during the life of the widow is clear and convincing." That the occupancy of the vendee, Carver, in that case would have been adverse but for the fact stated is shown by this excerpt from the opinion:

"It is conceded that the property in question was that of John S. Elmore, and as his wife failed for so great a number of years to ask to have dower assigned to her in this property, it is presumed, and conclusively so, that she elected to take a homestead interest therein; and, having but a homestead interest, by her sale and conveyance to appellant she forfeited or lost this right (Freeman v. Mills, 19 Rep. 316), and the heirs-at-law of her husband, as soon as the homestead right in the widow was lost to her, were entitled to the possession thereof, for she, having a right to the use of this property only so long as she chose to exercise it, and her sale of it being an abandonment of this right, her purchaser, the appellant, acquired nothing by reason of his purchase. Freeman v. Mills, 22 Rep. 859. Hence, any rights that appellant has in the property accrued to him by virtue of the adverse holding set up and relied upon in the pleadings."

From this it will be seen that after a considerable number of years it will be conclusively presumed that the widow elected to take her homestead right in the land rather than dower, especially when the former would be more beneficial to her and her children; and further, that the purchaser of the homestead right of a widow while he takes nothing under his purchase, becomes an adverse holder from the time he took possession thereunder. Other cases from this court holding the same rule are Jones v. Green, 26 Ky. Law Rep. 1191; Freeman v. Mills, 19 Ky. Law Rep. 316; Same v. Same, 22 Ky. Law Rep. 859, and White v. Holder, *supra*. It follows, therefore, that the occupancy of the land in this case became hostile to the owners in fee from Marc' 27, 1897, at the time the widow attempted to sell her homestead right, which we have presumed she elected to take upon the

death of her first husband; and further, that such hostile holding continued without interruption until the filing of this suit, and on March 27, 1912, it had continued for fifteen years.

Section 2506 of the Kentucky Statutes reads: "If, at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

Under this section it has been frequently held that one is not allowed fifteen full years after arriving at twenty-one years of age within which to bring suit to recover real property adversely held while he was an infant, but only three years after he becomes twenty-one. *Bankston v. Crabtree Coal Mining Co.*, 95 Ky. 455; *Sharp v. Stephens' Com.*, 21 Ky. Law Rep. 687, and *Dukes, et al. v. Davis, et al.*, 125 Ky. 313. And this is true although the period of limitations and the extended time after the removal of the disability are partly or wholly concurrent. To more clearly state our meaning: If the limitation period is completed while the disability exists, suit may be brought within three years after the disability is removed. But if the disability is removed before the completion of the limitation period, then the extension provided by section 2506 becomes concurrent with the running of the statute. The statute does not give in all cases three years in which the one under disability may sue after the limitation is complete, but only three years after the disability is removed.

In the *Dukes* case, *supra*, this court, in construing section 2506 of the Statutes so as to confine the right of action to only three years after the removal of the disability said: "The purpose of section 2506 is not to extend the statute of limitation three years in any cases save those in which the disability is not removed more than three years before the expiration of the fifteen years; it being the purpose of section 2506 to give such persons as are under disability at the time the cause of action accrues three full years after the removal of the disability within which to bring their suit. And it is not the purpose of the statute to extend the period fixed save in those cases where it is necessary in order that the claimant may have the benefit of three full years within

which to sue. Plaintiff having failed to institute her suit within fifteen years from the time her cause of action accrued, and within three years after the removal of her disability, the trial court should have held the plea of the statute of limitation interposed by the defendants well taken, and a bar to plaintiff's right to recover."

Applying that construction of the statute to the facts of this case we find that defendants and those through whom they claim had held the land adversely to plaintiffs for fifteen years on March 27, 1912. At that time the youngest plaintiff had been twenty-one years of age for nearly six years, and under the doctrine of the *Dukes* case and others plaintiffs should have filed their suit before the expiration of the fifteen years on the date above mentioned. Even if it should be contended that the suit might have been maintained at any time three years after that date (which we do not hold), then the time expired in 1915.

There is nothing in the case of *McDowell v. Hollowell*, 173 Ky. 543, in conflict with anything we have said. On the contrary, in that case it is held that the vendee of the widow became an adverse holder to the heirs of the husband on the execution of her deed. There seems to be no escape from the conclusion that plaintiffs have slept upon their rights and that the plea of limitations should prevail.

Wherefore the judgment is reversed, with directions to dismiss the petition and for proceedings in accordance herewith.

Louisville & Interurban Railroad Company v. Clore.

(Decided February 14, 1919.)

Appeal from Oldham Circuit Court.

1. **Railroads—Injuries to Persons on Track—Lookout—Instructions.**
—Where the public with the knowledge and acquiescence of the railroad company have continuously used its track for a long period of time, in populous and thickly settled communities, the presence of persons on the track where it is so used must be anticipated by the company in running its trains, and it owes to such persons the duty of keeping a lookout and giving warning the same as is required at public crossings, and if a person

is injured at such point by a failure to give warning or keep a lookout, a recovery may be had unless the contributory negligence of the person injured is such as to defeat it, and this question should be submitted to the jury on proper instructions.

2. Railroads—Crossings—Lookout.—A railroad company is not exempt from liability for damages inflicted at a private crossing where the crossing is in a town and at a place where the presence of persons on the track is to be anticipated, and which crossing is used daily by a great number of people, since at such places the company is required to keep a lookout and to give reasonable warning of the approach of the train to the crossing.
3. Trial—Evidence—Verdict.—Where the evidence is conflicting, it is the duty of the jury to reconcile it and find the fact, and it is improper in such cases for the court to determine the fact by directing the jury to return a particular verdict.
4. Damages—Excessive Damages.—Where plaintiff by a collision with a train was thrown about 25 feet and sustained bruises to different parts of his body, a fracture of his elbow and a wrenching of his back, and was made to suffer considerable pain and disabled from work for several months, a finding in his favor for \$650.00 will not be set aside as excessive.

WILLIS, TODD & BOND for appellant.

EDWARDS, OGDEN & PEAK for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

About nine o'clock on the morning of February 26, 1917, appellee and plaintiff below, C. P. Clore, was attempting to drive across the track of the appellant, Louisville & Interurban Railroad Company, in the town of Crestwood, Oldham county, when an east bound car of defendant collided with his buggy, destroying it and throwing plaintiff some twenty feet or more beyond the crossing and into the pike running parallel with the railroad track. He brought this suit seeking damages for the injuries he sustained which he alleged were due to the negligence of the defendant in carelessly operating its car as it approached the crossing and in failing to give signals of its approach to the crossing. The negligence was denied by the answer and a plea of contributory negligence was interposed. Upon trial the jury returned a verdict in favor of plaintiff for the sum of \$650.00, upon which judgment was rendered, and complaining of it the defendant prosecutes this appeal.

Only two grounds for reversal are urged before us, they being (1) that defendant's motion for a peremptory

instruction should have been sustained because, it is insisted, the evidence fails to show any negligence on the part of defendant but does show negligence on the part of plaintiff. (2) That the verdict is excessive and is contrary to the evidence.

Considering the contentions in the order named: (1) It appears that Crestwood is a town with a population ranging from one hundred to four hundred people, located in a densely populated community. The tracks of the defendant and those of the Louisville & Nashville Railroad Company run parallel through the town east and west at a distance of perhaps one hundred feet apart. Just north of the track of defendant is the pike and about 450 feet east of defendant's station in the town and just south of its track is a large, two-story building used as a creamery. The west end of the creamery building is about ten feet from defendant's track, while its east end is only about four and one-half feet from the track. It is not shown which was located first, the creamery building or defendant's track, both having been used and operated as now located for something more than twelve years. A road or passageway crosses defendant's track from the pike at the west end of the creamery building, extends around it and again crosses the track at its east end. Those who make deliveries of milk or cream enter this passageway at either end, go around to the rear of the creamery, where their product is unloaded, and pass out at the other end of the passageway.

On the morning in question plaintiff had crossed the track at the west end of the creamery building, delivered his milk, and had started to leave the creamery over the passway at the east end, when the collision occurred. It is shown that these passways have been used in the manner indicated by at least fifty or more people each day since the creamery was established. Other people have occasion to use them in going to and from a lumber yard, a residence, and a picture show building, all located between the tracks of the defendant and that of the Louisville & Nashville Railroad Company. Under these facts and circumstances there can be no doubt but that defendant's duties in running its cars over the two crossings mentioned are measured by the rule laid down in the cases of *Davis v. Louisville, Henderson & St. Louis Ry. Co.*, 30 Ky. Law Rep. 172; *Same v. Same*, 32 Ky. Law Rep. 580; *Louisville & Nashville Ry. Co. v. Mc-*

Nary's Admr., 128 Ky. 408 and C. & O. Ry. Co. v. War-nock's Admr., 150 Ky. 74, and cases therein referred to. That rule as stated in the Davis case is:

"Appellant was not a trespasser at the time and place she received the injury; if she had been the company would owe her no lookout duty, nor would it have been required to give warning of the approach of its engines, and would owe no duty except to exercise ordinary care to prevent injury, after she was actually discovered in a place of peril. But, as has been frequently held by this court, where the public, with the knowledge and acquiescence of the railroad company, have continually used its tracks for a long period of time, the presence of persons on the track at the point where it is so used must be anticipated by the company in running its trains, and it owes to the persons thus habitually using its right of way the duty of giving warning and keeping a look-out, substantially the same as is required at public cross-ings; and if a person is injured at such point by the failure of those in charge of the train to give warning of its approach, or keep a lookout, a recovery may be had, unless the contributory negligence of the injured person is such as to defeat it. McCabe v. Maysville & Big Sandy R. Co., 28 Ky. Law Rep. 536; L. & N. R. Co. v. Daniel, 28 Ky. Law Rep. 1146; L. & N. Railroad Co. v. Redmond, 28 Ky. Law Rep. 1293; K. & I. Bridge Co. v. Sydnor, 26 Ky. Law Rep. 951; Wilmouth v. I. C. R. R. Co., 25 Ky. Law Rep. 671; Eskridge v. C. N. O. & T. P. Ry. Co., 89 Ky. 367; Paducah & Memphis R. Co. v. Hoehl, 12 Bush, 41; Cahill v. Cincinnati R. Co., 92 Ky. 345; Shelby v. C. N. O. & T. P. R. Co., 85 Ky. 224; Illinois Central R. R. Co. v. Murphy's Admr., 30 Ky. Law Rep. 93."

In the McNary case the accident occurred in the town of Barnsley, which has a population of four or five hundred inhabitants, while the plaintiff was attempting to cross defendant's track over a path which was not a public street but over which from fifty to one hundred people passed each day, and this court held that it was such a place as required those in charge of and operating the train producing the injury to anticipate the presence of persons and to moderate the speed of the train accordingly, keep a lookout and give notice and warning of the approach of the train "as the circumstances demand for the proper security of human life." None of the cases hold that such precautionary methods are required in *rural communities*, but only in places where the population is

dense and the presence of persons upon the track is to be anticipated, and the presence of persons is to be anticipated where under a license from or with the acquiescence of the company its track is used in such communities by a goodly number of people each day.

Under this doctrine there can be no doubt that it was the duty of the defendant in approaching the crossing where the injury occurred in the instant case to keep a lookout for the approach of persons upon the track and to give such reasonable warnings and signals as would be calculated to notify travelers of the approach of the train. And this, according to the proof, seems to have been defendant's understanding of its duties, for it is shown that it has constantly observed the custom of giving signals for the approach of cars at this particular crossing. *Louisville & Interurban R. Co. v. Morgan*, 174 Ky. 633. According to the proof it maintained a lookout on this occasion but did not see the approach of plaintiff from behind the creamery until the car was within ten or fifteen feet of the crossing, which was too late to stop in time to avoid the collision.

There is considerable contradiction in the proof as to whether it gave any signals for that crossing. Plaintiff testified that he looked to discover the approach of cars from the east and listened for the approach of a car from the west but heard no signals. Some half dozen or more witnesses in the immediate vicinity of the crossing and the station testified that they heard no signal, although they were located so as to have heard them if any had been given. We think this evidence, although negative in its character, and admissible—as has been many times determined by this court—was sufficient, with plaintiff's testimony, to authorize a finding by the jury that no signal was given, and if not the defendant violated its duty as required by the rule of the cases, *supra*. In arriving at this conclusion we have not overlooked the fact that some four or five witnesses who were upon the car which collided with plaintiff testified positively that the whistle was blown about 200 feet from the crossing, and that the bell also rang from that point to the crossing.

But it is insisted that since the creamery building obstructed plaintiff's view he was guilty of negligence in going upon the track. This court has never adopted the "stop, look and listen" doctrine as applied to the traveler over grade crossings; but if that doctrine did apply in

this state plaintiff could not see in the direction from whence the car came until he had passed the corner of the creamery building but could exercise his other faculty of listening, which he says he did, and no one contradicted him. The fact that plaintiff's horse was traveling in a slow trot as he came from behind the building and as he approached the track can not be an act of negligence on his part, since that fact could in no way contribute to his injury. The court submitted to the jury the issues of plaintiff's negligence and defendant's contributory negligence by instructions aptly drawn, and of which no complaint is made. The most that can be said is that upon those issues there was a contrariety of testimony, and under the rule of practice in this state it is preeminently the duty of the jury in such cases to reconcile the testimony and return its verdict according to its finding of fact. That finding in this case upon each of the contested issues was warranted by the testimony, and it was not error for the court to refuse the offered peremptory instruction.

In regard to the (2) contention—that the verdict is excessive and is contrary to the evidence—it appears that plaintiff was knocked a considerable distance, falling upon his left hip in the middle of the hard pike, which inflicted a painful bruise upon his hip, hurt his back and caused a fracture of one of his elbows. He contracted a physician's bill of \$50.00, and was sore and nervous for quite a while after the accident. His injured limbs at the time of trial were smaller than the others. For years he had been suffering with a curvature of the spine, commonly known as Pott's disease, and there is testimony that this trouble was aggravated, which condition prevented plaintiff from doing work which he had theretofore been able to do, as well as producing additional and more severe pains.

It is sometimes a difficult matter to determine whether a verdict is excessive, and this court has adopted the rule that unless the verdict returned by the jury is so excessive as to appear to have been returned under the influence of passion or prejudice, it will not be disturbed. We are not prepared to say in this case that the verdict was returned under those circumstances. What we have thus far said relates only to plaintiff's physical injuries. The jury had the right to take into consideration, as directed by the instruction, the mental anguish which plaintiff suffered, in addition to his physical injuries,

and when all these matters are considered we do not think the verdict should be disturbed as being excessive.

Perceiving no error prejudicial to the substantial rights of the defendant, the judgment must be and it is affirmed.

Thornton v. Durette.

(Decided February 14, 1919.)

Appeal from Marion Circuit Court.

1. **Appeal and Error—Jurisdiction—Supersedeas.**—An appeal from a money judgment for a sum as much as \$200.00, exclusive of interest and costs, but less than \$500.00, can be granted only by the Court of Appeals. Judgment can be superseded only by a bond executed before the clerk of the Court of Appeals.
2. **Appeal and Error—Jurisdiction.**—Where the amount of the judgment is less than the minimum amount necessary to give this court jurisdiction the court will entertain the appeal where a valid or meritorious cross-petition or counterclaim is tendered or filed in an amount sufficient to give jurisdiction.
3. **Appeal and Error—Law of the Case.**—Judgment of this court, on a former appeal, being the law of the case all questions that were then presented or were properly before the court are as conclusively settled as if specifically mentioned and considered.

HUGH P. COOPER for appellant.

H. W. RIVES and L. S. PENCE for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Dismissing appeal without damages.

The appellant, appellee and T. A. Wayne were interested in the stock trading business under various partnership agreements. Wayne brought suit against Durette in the Marion circuit court, seeking to recover certain sums alleged to be due him on account of the profits by Durette & Son of certain cattle that had been contracted for by the firm of Wayne and Durette. Durette made his answer a cross-petition against Thornton and Wayne, claiming to be a partner in the firm of Wayne & Thornton, and that he was entitled to one-third of the profits of the said last named firm, which he alleged amounted to \$1,500.00.

Conceiving that Durette was not a partner in the firm both Thornton and Wayne, in separate responsive pleadings to Durette's answer and cross-petition, failed to take issue on the question of profits or to introduce any testimony relative thereto. The case was tried and the lower court entered a judgment to the effect that Durette was a partner in said firm and entitled to one-fourth instead of one-third of the profits as claimed by him; Wayne to another fourth and Thornton to one-half, and gave judgment in favor of Durette against Wayne for \$146.25. Both Wayne and Durette appealed from this judgment.

Wayne superseded the judgment against him and executed a supersedeas bond with the appellant Thornton as surety. Motions for appeals in both cases were denied and the judgment affirmed by this court October 27, 1916.

Thereafter Durette caused execution to issue against Wayne for the amount of his judgment and costs, and this execution was returned by the sheriff of Marion county with the endorsement, "No property found to make said execution against T. A. Wayne, or any part thereof."

Durette then filed the present suit against Thornton, surety on the supersedeas bond, asking for judgment for the principal of said bond, to-wit, \$146.25, with interest from October 19, 1914, the date of the judgment, \$24.45 costs in the circuit court and \$39.60 costs in the Court of Appeals. Thornton demurred to this petition and the demurrer having been overruled filed a pleading entitled "answer, set-off, counterclaim and cross-petition," in which pleading he alleged the clerk of the lower court had no authority to issue a supersedeas, the judgment being under \$500.00, and further that the profits of Wayne & Thornton were not \$1,102.00 but \$510.00, also claiming certain charges in his favor against the firm and the members thereof. The court sustained a demurrer to this pleading and entered judgment against Thornton for the amount prayed for.

Thornton prayed and was granted an appeal in the lower court and superseded this judgment by executing bond before the clerk of the Marion circuit court. On March 8, 1917, appellee filed the record in this court and moved to dismiss the appeal. Appellant also filed a copy of the record April 20, 1917, and various motions have been made on the appeal since that time.

The amount of the judgment appealed from is \$146.25, plus costs in the former suit, a total of \$210.30, therefore the court below was without authority to grant the appeal. This could only have been done by motion for an appeal. See Ky. Stats., section 950, subsection 3, as amended by the act of 1914, p. 94.

In Childers, etc. v. Ratcliffe, et al., 164 Ky. 123, the court said: "Under the first section of the act of 1914, and rule 20 of this court, adopted for the purpose of administering the act, an appeal from a money judgment for a sum as much as \$200.00, exclusive of interest and costs, but less than \$500.00, can be granted only by the Court of Appeals and the judgment can be superseded only by executing a bond before the clerk of the Court of Appeals.

"The Pike circuit court was, therefore, without jurisdiction to grant the appeal in this case; the attempt to do so was a nullity; and there being no appeal, the superseder's bond was void. Asher v. Cornett, 126 Ky. 572; Turner v. Wickliffe, 146 Ky. 776; Torbitt & Castleman v. Middlesboro Grocery Co., 147 Ky. 343; Dougherty v. Central Trust Co., Exr., &c., 155 Ky. 380."

We have held that though the amount of the judgment be less than the minimum amount necessary to give this court jurisdiction that where a valid or meritorious cross-petition or counterclaim is tendered or filed in amount sufficient to give jurisdiction, then the court would entertain the appeal. Co-operative Mfg. Co., etc. v. Rusche, 30 Rep. 790; District of Highlands v. Michie, 32 Rep. 761.

But the allegation upon which appellant based his answer, set-off, counterclaim and cross-petition are matters that should have been set up and litigated in the original action, and which as a matter of fact Wayne attempted to set up in that case in an amended pleading. This court having heretofore passed upon the appeals from the original judgment the parties are now precluded from having this same matter relitigated.

The judgment of this court on the former appeal being the law of the case all questions which were then presented or were properly before the court are as conclusively settled, though not referred to in the opinion, as if they were specifically mentioned and considered. Harcourt & Co. v. Redmon, 149 Ky. 612; Hopkins v. Adam Roth Gro. Co., 105 Ky. 357. Hence the circuit court properly sustained the demurrer to appellant's pleading. This being true there is nothing here but the

judgment for \$146.25. See *C. & O. Ry. Co. v. Rowe*, 21 Rep. 1145; *Cumberland Tel. & Tel. Co. v. Logsdon*, 142 Ky. 639; *Montgomery v. Montgomery*, 25 Rep. 1682.

Upon this state of the record the appeal must be dismissed because this court has no jurisdiction of the appeal and the court is without jurisdiction to order damages on the supersedeas bond. See *Wilson v. Hite*, 154 Ky. 61; *Asher v. Cornett*, 126 Ky. 569; *Dougherty v. Central Trust Co., Ex'r*, 155 Ky. 380.

Wherefore the appeal is dismissed without damages.

Hatcher v. Hatcher.

(Decided February 14, 1919.)

Appeal from Barren Circuit Court.

1. **Appeal and Error—Presumption.**—On an appeal from a judgment rendered by the chancellor, in the absence of the record showing to the contrary, it will be presumed that the judgment was properly and regularly entered and that the pleadings and testimony supported the judgment.
2. **Appeal and Error—New Trial.**—In an action for new trial pursuant to sections 518-523 of the Civil Code it is necessary for the plaintiff seeking to vacate the judgment to file a copy of the record with the petition, or set out with sufficient fullness and definiteness facts relative to the judgment sought to be affected as to enable the court to determine whether or not plaintiff is entitled to a new trial.

W. S. SMITH for appellant.

BAIRD & RICHARDSON for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellee, wife of the appellant, filed her suit in the Barren circuit court on July 8, 1911, seeking a divorce from the appellant and asking the custody of her infant children, and alimony in the sum of \$2,000.00.

July 15, 1911, the answer of the appellant was filed, in which it is stated he had no defense to make to the petition, and with his answer he filed an agreement entered into between the parties, wherein they agreed upon a settlement of their property rights. It appears that judgment was duly entered in said suit, the prayer of the petition being granted.

October 2, 1916, appellant filed this suit seeking to set aside the judgment rendered in the divorce suit and asking that the appellee be restrained from selling or conveying the land which she received under the previous judgment, and that said land be restored to him. The issues being made up and proof taken the court entered a judgment dismissing plaintiff's petition, and he has appealed.

It is evident that plaintiff is seeking to set aside the judgment in the divorce proceeding under title 12 of the Civil Code, but his petition does not allege facts sufficient to entitle him to the relief he seeks.

It is alleged in the petition that the answer which he signed, and which was filed in the divorce suit, as well as the contract settling the property rights, was prepared by the attorneys for his wife; that he was suffering physically at the time and was not in his right mind; that but for the fraud and deceit practiced upon him in securing the divorce "he would and could have made a good and sufficient defense in said divorce suit." He also alleges that if allowed to tender an answer and produce proof in the divorce suit the plaintiff would not be entitled to either a divorce or alimony, but he nowhere sets up any defense that he might have, nor is there anything in the record to indicate the nature or grounds of any such defense. The only portions of the record in the divorce proceedings before us are the petition, answer and contract.

The claim of the appellant in the present case that the judgment was obtained by fraud, that he was overreached, and that the attorneys for his wife were guilty of unfair practice is not borne out by the record. He alleges that he was not served with summons until after his answer was filed, and knew nothing of the proceedings in the divorce suit because of his mental condition; but a careful reading of his deposition would indicate he had a very clear and vivid recollection of everything that transpired. For example, he testified he had been summoned by the sheriff to come to court; that he went to the county seat with his wife; that they had talked about a settlement of their affairs for several days before they came to the city, and he told her he would settle it according to law. He admits the signature to the contract is his; that the contract was read to him before he signed it; his wife was present at the time; that he got certain

of the property, to which he was entitled under the contract.

The appellant, his wife and the latter's attorney went together to the court room, the court being in session at the time, and the contract was read to the judge in appellant's presence. In this connection appellant admits he was asked the following questions and made the answers indicated: "Q. You and your wife both present and heard it read? A. Yes, sir, that is just what I told you. Q. Was it then that Judge Jones asked you if it was satisfactory? A. Yes, sir. Done told you that. Q. What did you tell Judge Jones there in open court? A. I told him *yes, sir.*"

He testifies that immediately thereafter he went home and he proceeded to take some of the things allotted him under the contract. It is manifest, therefore, that he must have understood thoroughly what he was doing at the time, as he stated in open court.

On an appeal from a judgment rendered by the chancellor, in the absence of the record showing to the contrary, this court will presume that the judgment was properly and regularly entered, and that the pleadings and the testimony support the judgment.

A party seeking a new trial, under sections 518-523 of the Civil Code, must comply with the provisions thereof, and we have written on numerous occasions that unless he does so he has no standing in court.

In *Noe v. Davis, et al.*, 171 Ky. 482, it is said: "The judgment sought to be vacated, and the proceedings in the action in which the judgment was rendered must be fully set out, or the record made a part of the petition. It has been held in a number of cases, that regularly the record in the action in which the judgment sought to be set aside was rendered, should be made a part of the petition for a new trial. An action for a new trial, in pursuance to sections 518, 519 and 520, of the Civil Code, is a new and independent action, and nothing is brought by it to the attention of the court except what is contained in the pleadings. Section 521 provides that the judgment shall not be set aside until it is adjudged that the plaintiff has a valid defense to the action in which the judgment was rendered. It is apparent that it would be idle to set aside a judgment and grant a new trial upon the application of a defendant, unless he had a valid defense to the action in which the judgment was rendered. Hence, it is necessary to set out in

the petition for a new trial all the proceedings and the issues, that the court may be able to tell whether the proposed defense plead in the petition will constitute a valid defense to the matters plead in the action in which the judgment sought to be vacated was recovered. *Louisville Tobacco Warehouse Co. v. Wood & Bumgardner*, 26 R. 769; *Rice v. Wyatt*, 25 R. 1060; *Weir v. Weir*, 19 R. 2005; *Overstreet v. Brown*, 23 R. 317; *Johnson v. Carter*, 23 R. 596; *Flint v. I. C. R. R. Co.*, 97 S. W. 736."

The rule requiring the record to be made a part of the petition has been modified to a certain extent. For instance, in *Smith v. Chapman*, 153 Ky. 70, the court held that every material fact necessary for the advice and enlightenment of the court having been complied with, the petition stating facts with reference to the judgment sought to be affected with sufficient fullness and definiteness to enable the court to determine whether or not there has been a miscarriage of justice, because of casualty or misfortune, which prevented the complaining party from producing his evidence or properly presenting his case, this was a sufficient compliance with the provisions of the Code. Says the court: "If the court can be advised of the issue tried and shown that the newly discovered evidence, had it been introduced, would most likely have produced a different result, the ends of the law are satisfied and the complainant should not be put to the expense of making the whole of the old record a part of his pleadings. The tendency of courts is toward the simplification of pleadings, and if the requirements of the case can be complied with, without making the record in the old suit a part of the new, it is a commendable practice not to do so." The ruling in this case was approved in *National Concrete Con. Co. v. Duvall*, 153 Ky. 394, wherein we find this language: "The facts averred brought clearly to the attention of the court the grounds upon which a new trial was sought and set out with sufficient elaboration and certainty the record and proceedings in the former trial to enable the court to determine from an inspection of the petition the grounds upon which the new trial was asked, and to decide whether the newly discovered evidence, if it has been introduced on the trial, would have certainly affected the result. Every fact developed in the old case essential to an understanding of the single issue upon which a new trial was sought, was set out, and the remainder of the

old record would have been a needless and expensive encumbrance."

The record before us does not comply with the rule as thus modified. Finding no error in the judgment of the lower court same is accordingly affirmed.

William Craig's Administratrix v. Kentucky Utilities Company.

George Craig, By etc. v. Kentucky Utilities Company.

(Decided February 14, 1919.)

Appeals from Harlan Circuit Court.

1. Evidence—Corporations—Declarations of Agents—Admissibility.—The declarations of agents of a corporation are binding on the corporation only when made in the course of, or in connection with, the performance of their authorized duties.
2. Master and Servant—Dangerous Instrumentality—Electric Wires.—Where linemen are not entrusted with the control and generation of electricity, but are entrusted merely with bundles of wire for use in making repairs, such bundles of wire are not dangerous instrumentalities, within the rule requiring the master to exercise a proper degree of care to guard, control and protect dangerous instrumentalities owned or operated by him, and to respond in damages for an injury caused by improper use of such instrumentalities by a servant, though not then engaged in performing his duties.
3. Principal and Agent—Powers of Agent—Scope of General Authority.—Linemen in the employ of an electric power company, having general powers to repair the line and protect wire entrusted to their care, have no authority to attach bundles of wire to a charged wire in such a way as to make a death trap for those who may attempt to steal the wire or take it away.

J. G. & J. S. FORESTER for appellants.

GORDON & LAURENT, W. F. HALL, N. R. PATTERSON and BERNARD FLEXNER for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

The first suit mentioned in the caption was brought by William Craig's administratrix against the Kentucky Utilities Company to recover damages for his death. The

second suit was brought by George Craig against the same defendant to recover damages for personal injuries. The two suits were tried together and at the conclusion of the evidence for plaintiffs, the jury was peremptorily instructed to find for the defendant. Plaintiffs appeal.

Prior to the accident, the defendant had constructed, and had in operation, a high power transmission line through a section of Harlan county. The transmission line consisted of poles and wires charged with electricity and was constructed on the defendant's right of way which was unenclosed. The poles were from 25 to 40 feet long, and the wires were from 20 to 30 feet above the ground. On the day of the accident, William Craig and George Craig, two brothers, were out on the mountain side digging ginseng. At that time a copper wire, attached to a large rock, was placed around one of the higher power wires. On one side the rock hung down, and on the other side the copper wire was attached to a bale of galvanized wire, which hung within a few inches of the ground. The result was, that the galvanized wire was heavily charged with electricity. Believing that a storm was impending, William and George Craig started towards a large cliff to procure shelter from the rain. While running, William Craig came in contact with the bale of wire and was instantly killed. George ran against him and was so badly injured that he lay on the ground all night and did not recover consciousness until the next morning.

On the day before the accident, George Lee, Charlie Young and Henry Young passed the place where the accident occurred. There they saw two men whom they had seen working on the line before. One was on the pole and the other on the ground. At that time, they were working on the wire that hung down from the high power wire. Charlie Young said, "What are you fixing that for?" alluding to the wire hanging down. In response to this question, they said, "People had been, or some one had been along there meddling with their wire, hanging things on them and rolling their wire off on the mountain side along there and doing them a right smart damage, bothering them a right smart, and the next one that come along meddling with their wire they would find him there; they'd know who he was." While witnesses were there, they did not see the men at work do anything but suspend the copper wire which caused the accident. There was further evidence that the men at

work were named "Adams," and had been working for the company for some time. Another witness testified that he had seen Jim Redmond along the line overseeing the work. Another witness testified that he had a conversation with Redmond, the foreman, in which Redmond stated that someone had been stealing his wire, and that he was going to fix a trap and the next man who laid his hand on it he would catch him. This evidence, however, was excluded.

The declarations of agents of a corporation are binding on the corporation only when made in the course of, or in connection with, the performance of their authorized duties. 1 R. C. L., section 52, p. 512. Here, it does not appear where, or under what circumstances, the alleged declaration of Redmond, the foreman, was made, and in the absence of such a showing we are not prepared to say that the trial court erred in excluding his declaration. But, if we go further and assume that his declaration was admissible, the case presented by the record is this: Redmond was the foreman of the crew. What their duties were does not appear. From the fact that the construction work had been completed and the employes, who attached the wire, were frequently seen at work on the line, we may infer that they were linemen charged with the duty of making such necessary repairs as the foreman Redmond might direct. We may further infer that they were entrusted with bundles of wire for use in making such repairs, and that it was their duty to take care of the wire. Under these circumstances, the rule requiring the master to exercise a proper degree of care to guard, control and protect dangerous instrumentalities owned or operated by him, and to respond in damages for an injury incurred by reason of the improper use of such an instrumentality by a servant, though not then engaged in the performance of his duties, is not applicable. That rule applies only where the agency or instrumentality is dangerous in itself, and not to such agencies or instrumentalities as become dangerous solely from their improper or negligent use. *Tyler v. Stephans' Admr.*, 163 Ky. 770, 174 S. W. 790. Here the control and generation of electricity were not entrusted to the linemen. They were merely entrusted with bundles of wire to be used in making repairs, and the wire was not inherently dangerous.

It may be conceded, however, that the spring gun doctrine applies. Under this doctrine, the company is

liable even though the Craig boys were trespassers, if, as a matter of fact, the company's employees, in fixing the death trap, were acting within the scope of their employment, and this question in turn depends on whether they were acting with the company's assent, express or implied. No express assent is shown. As before stated, the precise duties of the foreman and the other employees do not appear. To say that the act of the other employees was with the assent of the company because it was authorized by the foreman, is to assume, without proof of the foreman's duties, that he had authority to bind the company. For aught that appears in the record, he had only the authority to supervise the work of the other linemen while engaged in making repairs. It is not even shown that he was charged with the general supervision, control and protection of the company's property. But, admitting that the foreman and the rest of the crew were entrusted with the company's wire, and therefore had the right to protect the wire, the question is, did this duty carry with it implied authority to prepare a death trap for those who attempted to steal or remove the wire? Ordinarily, the master does not invest his employees with authority to kill trespassers in an effort to protect his property and it is doubtful if such authority may ever be implied from mere admissions made by his employees while engaged in the preparation for, or in the performance of, such an act. Indeed, it has been held that the mere employment of a watchman to guard and protect property does not confer authority to shoot persons who may have unlawfully entered on the property. 18 R. C. L., section 265, p. 811; Robards v. P. Bannon Sewer Pipe Co., 130 Ky. 380, 113 S. W. 429, 132 A. S. R. 394, 18 L. R. A. (N. S.) 923. It is only under exceptional circumstances, such as where a railroad watchman has authority to arrest a person, or a watchman for property is furnished with firearms with the right to use them at his discretion, that the employer is held liable for such acts. We applied this rule in the case of Strader's Admx. v. President and Directors of the Lexington Hydraulic Manufacturing Co., 146 Ky. 580, 142 S. W. 1073, where we held that an agent of a water works company, with general powers to remove trespassers from a fishing and hunting preserve had no authority to shoot them, or to order another to shoot them. But it is insisted that the company's employees were furnished wire, just as the watchmen in the cases referred to were fur-

nished firearms. Manifestly, there is no analogy between the two cases. When a watchman is furnished firearms, he has implied authority to shoot, but when a lineman is furnished wire to be used in repairing property, its use for the purpose of a death trap is entirely foreign to the purposes of the master.

But it is argued that the employes were acting within the scope of their employment because they were serving the company and not themselves. The rule is that the master is not liable for the torts of a servant done while in the performance of the servant's duties, unless the act itself pertains to the service for which he is employed. The mere fact that the act is done by the servant with the intention of serving the master is insufficient to bring it within the scope of his employment. *Farber v. Mo. Pac. Ry. Co.*, 32 Mo. App. 378. If, in this case, we assume that the employes were entrusted with the wire for use in making necessary repairs, and had the right to take care of and protect the wire, it by no means follows that they were actually serving the company because they charged the wire with electricity so that it would kill anyone who came in contact with it. On the contrary, it would appear that they adopted this method rather than go to the trouble of carrying the wire with them, or putting it in some farmhouse or other place of safety. Indeed, their admissions at the time tend to show that the plan which they put into effect was adopted for the purpose of saving themselves from trouble and annoyance, and that they were therefore serving their own convenience rather than the interests of the company.

Upon the whole, we conclude that mere authority to take care of and protect the wire furnished by the company for use in making necessary repairs, did not carry with it implied authority to prepare a death trap for those who might desire to steal the wire or take it away. Were the rule otherwise, then every servant, charged with the general duty of protecting his master's property, would have implied authority to kill every trespasser, either by using firearms, or a spring gun, or other form of death trap, thus making the master liable for every crime which the servant might see fit to commit, just so the servant declared he committed the crime for the purpose of protecting his master's property. The law does not go this far.

What we have said does not conflict with our ruling in the cases of *South Covington & Cin. St. Ry. Co. v. Cleveland*, 100 S. W. 283; *Williams' Admr. v. Southern Ry. Co.*, 115 Ky. 230, 73 S. W. 780, and *Willis v. Maysville & B. S. R. R. Co.*, 122 Ky. 658, 92 S. W. 604, 13 Ann. Cases, 74. In the first case, the street railroad was held liable for the act of the company's inspector in laying his hands on plaintiff. It was shown to be the duty of the inspector to investigate accidents and ascertain how and to what extent persons were injured. The liability of the company for the act of the inspector was based on the fact that "the inspector was acting in the interest of the company," and in laying his hand upon the person of plaintiff, "he was attempting to ascertain the extent of her injuries for its benefit." In the second case, the railroad company was held liable for the act of its brakeman in pushing a boy off a moving freight car, on the ground that the brakeman had authority to remove trespassers. In the last mentioned case, a boy standing in a public street of Greenup was struck by a piece of ice, kicked by a brakeman from the platform of the caboose of a passing freight train. The evidence showed that it was the duty of the brakeman to keep the caboose in proper order. The court held that he was acting within the scope of his authority in removing the obstruction from the platform, and that plaintiff was entitled to recover.

It follows that plaintiffs were not entitled to recover, and that the court did not err in directing the jury to return a verdict in favor of the defendant.

Judgment affirmed.

Sproul v. Inter-State Coal Company.

(Decided February 14, 1919.)

Appeal from Knox Circuit Court.

Boundaries—Survey—Patent.—When the lines of a patent were not in fact run upon the land in the survey upon which it was based, and it cannot be determined from the calls of the patent with certainty what land it includes, if any, the patent will be held void for uncertainty.

J. D. TUGGLE and W. R. LAY for appellant.

BLACK, BLACK & OWENS for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

As was stated in the opinion upon the former appeal of this case, which is reported in 160 Ky. 211, and contains copies of the map and patents referred to herein, J. C. Sproul brought this suit against the Inter-State Coal Company to recover 25 acres of land which, as he alleged, was covered by a patent from the Commonwealth to his brother, G. W. Sproul, of date October 28, 1891, and had been conveyed to him by the patentee.

This patent upon the former appeal was held to be void for uncertainty. Upon the return of the case, plaintiff introduced more evidence than on the first trial, tending to prove that the white oak, which is located at figure 9 on the map, was a corner to the A. Legere patent, and the beginning corner of his patent, and that the chestnut, Berry Lathram's corner, called for as a corner in his patent, is a well known object and located at figure 3; he also introduced new evidence in an attempt to show that his patent might be closed from figure 1, to reach which all called for courses and distances had been disregarded, by following some eighteen or more lines of a 200 acre Lunsford survey, not referred to in the evidence upon the former trial, to his beginning corner, the white oak on the road at figure 9. It will be noticed that the only calls in his patent from the Spanish oak, Lathram's corner, located at figure 1 on the map, to his beginning are "thence E. 25 poles to a Spanish oak, Lunsford's corner; thence with Lunsford's line to the beginning," which rather clearly indicates that the survey was to be closed from Lunsford's Spanish oak corner by one or possibly more lines of his 100 acre patent previously referred to in plaintiff's patent, and it does not seem to have occurred until quite recently to plaintiff, who himself made this survey, that this was a reference to Lunsford's 200 acre survey; so we do not think this effort to close his survey conforms in any substantial manner with the calls of his patent, or that the new evidence introduced by him upon the last trial upon this question was any more satisfactory than the theory advanced by him for closing the patent upon the former trial, which was rejected by this court; but even if we might concede that the theory now advanced by him for closing his survey is a possible compliance with the calls of his patent, it would still be impossible in our judgment upon his evidence upon the last trial, to make his patent cover the land in controversy or any land.

He testified that he made the survey for his brother upon which his patent was issued; that he had theretofore twice surveyed for Lunsford the processioner's lines around his lands, including the public road from 9 to 14 on the map, and that there was at that time a fence from 14 to Lathram's chestnut corner at figure 3; he further admits he did not make an actual survey of the lines supposed to connect his white oak and chestnut corners, and it is apparent from reading the Legere patent that to connect these corners he simply copied the calls from the Legere patent, because both his patent and the Legere patent to connect the white oak and chestnut call for substantially the same courses and identical distances, which by survey do not even approximately connect these two corners. As stated in the former appeal, this same uncertainty as to the proper location of the connecting lines between the white oak and chestnut had resulted more than twenty years before in a controversy between Lunsford and Ballou, who then owned the Legere patent, by whose respective contentions these patents overlapped, and that they had in 1871 settled this controversy by having the lines processioned, and which were thus located so as to run with the county road, the crooked dotted line from 9 to 14, and with the fence from 14 to 3; so that when plaintiff attempted to locate his survey and patent in 1891 and copied from the Legere patent two intervening lines supposed to connect the white oak and chestnut, which he did not survey and which did not accomplish this result, he must have known that the lines of the Legere patent which connected the white oak and chestnut had been definitely located upon the land by processioners for the adjoining land owners, and that the error in the courses and distances by which these lines were described in the Legere patent, had been corrected by the visible and marked line between the white oak and the chestnut, running with the county road and the fence, as indicated by the line 9 to 14 to 3 on the map, and he cannot now get away from this long established location of these lines by a resort to a method of survey which would have been acceptable in the absence of an established, marked and known location theretofore made by the parties upon the land, because of the familiar rule that courses and distances and approved methods of surveying them, must yield to known objects and monuments called for, and here the Legere lines called for were, as

they had been located and marked on the ground, known objects, just as were the white oak and chestnut corners.

When plaintiff's lines connecting the white oak and chestnut are run with the lines of the Legere patent called for as they had been established, and of which plaintiff must have known before he made his survey, they coincide with the lines of the Lunsford 200 acre survey, which he now claims as his closing lines, but which evidently was not so regarded when the survey was made, as the reference in the patent is only to Lunsford's 100 acre patent; nor does such a possibility seem to have occurred to plaintiff himself until after the first trial of the case.

It is therefore apparent that even if we accept the introduction upon the last trial of the 200 acre Lunsford patent, as affording a possible basis for closing plaintiff's survey from the Spanish oak called for in his patent as Lunsford's corner, the location of his patent is shown to be even more indefinite and impossible than upon the first trial, because running with Legere's lines as they had been located and were then visibly marked upon the land, the first two lines of his patent pass along the eastern side of the land in controversy and coincide with his closing lines, and therefore include not only none of the land in controversy, but no land whatever. Consequently the trial court did not err in sustaining, at the close of the evidence introduced in plaintiff's behalf, the defendant's motion for a peremptory instruction.

Wherefore the judgment is affirmed.

**Louisville & Nashville Railroad Company, et al. v.
Board of Drainage Commissioners of Daviess
County, et al.**

(Decided February 14, 1919.)

Appeal from Daviess Circuit Court.

1. Eminent Domain—Drains—Railroads—Closing Rights of Way and Rebuilding Track.—By subsection 13 of section 2380, Kentucky Statutes, railroad companies are expressly required to bear the expense of closing their rights of way and rebuilding their tracks, bridges, &c., made necessary by the improvement of a natural water course by a board of drainage commissioners in the erection

of a drainage district, their recovery being limited to the expense of opening their rights of way for such purpose.

2. Eminent Domain—Drain—Railroads—Constitutional Law.—Since the erection of the drainage district has for its purpose the drainage of a portion of the state to make it healthful and fit for habitation and cultivation, the same is an exercise of the state's police power, and is not within the protection of the guaranties of section 242 of the State Constitution, and hence the act authorizing such improvement is not a violation thereof, in denying to a railroad company compensation for injuries or damages resulting therefrom.

TRABUE, DOOLIN & CRAWFORD, BROWDER & BROWDER,
W. P. SANDIDGE, R. V. FLETCHER and BENJAMIN D. WARFIELD
for appellants.

J. R. HAYS, C. W. WELLS and W. FOSTER HAYS for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

This appeal necessitates the construction of portions of section 2380 of the Statutes and section 242 of the Constitution of the state, appellants contending that the former does not place upon them the burden of bearing the expense of building a new bridge and tracks across Panther creek, a natural watercourse, made necessary by the widening thereof, and the removal of the existing satisfactory bridge and tracks across the same, by the valid establishment of a drainage district under our laws; and that if the statute, by its terms, does so provide, it violates the constitutional provision, both of which contentions were denied below.

1. The applicable portions of the statute are:

“Subsection 13. At the time agreed upon the said railroad company shall remove its rails, ties, stringers and such other obstructions as may be necessary to permit the dredge to excavate the channel across its right of way. The work shall be so planned and conducted as to interfere in the least possible manner with the business of said railroad. In case the railroad company refuses and fails to remove its track and allow the dredge to construct the work on its right of way it shall be held as delaying the construction of the improvement and such company shall be liable to a penalty of fifty dollars per day for each day of delay, to be collected by the board of drainage commissioners for the benefit of the drainage district as in the case of other penalties. Such penalty may be collected in any court having jurisdiction and

shall inure to the benefit of the drainage district. Within thirty days after the work is completed, an itemized bill for the actual expense incurred by the railroad company for opening its tracks shall be made and presented to the superintendent of construction of the drainage improvement. Such bill, however, shall not include the cost of putting in a new bridge or strengthening or enlarging an old one. The superintendent of construction shall audit this bill, and, if found correct, approve the same and file it with the secretary of the board of drainage commissioners. The commissioners shall deduct from this bill the cost of the excavation done by the dredge on the right of way of said railroad company at the contract price, and pay the difference, if any, to the railroad company.

“Subsection 14. It shall be the further duty of the board of viewers to assess the damages claimed by anyone that is justly right and due to them for land or property taken, injured or destroyed, because of the construction of the improvement, or for any other legal damages sustained, including the actual estimated amount saved on account of private ditches utilized. Such damage shall be considered separate and apart from any benefit the land would receive because of the proposed work, and shall be paid by the board of drainage commissioners when funds shall come into their hands.”

It will be seen that the legislature provided that where a drainage improvement crosses a railroad's right of way, the company must open its right of way by removing its rails, &c., and such other obstructions as are necessary to permit the construction of the drain across its right of way, and shall be recompensed by the board of drainage commissioners for expense thus incurred “for opening its tracks,” but that such bill “shall not include the cost of putting in a new bridge or strengthening or enlarging an old one.” It seems to us conclusive that the legislature, while manifestly dealing with the injury or damage such an improvement might impose upon a railroad company in crossing its right of way, by providing for what portion of its expense the company might present a bill, and what such bill should not include, expressed as clearly as was necessary to make its meaning understood, and provided in express terms that the company could not recover the expenses of closing its right of way or putting in a new bridge or strengthening or enlarging an old one. A provision that the company must bear

the expense of closing its right of way and a new bridge or the improvement of an old one to make it serviceable, would scarcely have been more explicit.

So that so far as this section alone is concerned, we are quite confident the meaning is clear and at least prohibits the company from including in its bill of expenses to be presented within thirty days after it opens its right of way, the cost of a new bridge as well as the expense of closing its right of way, though made necessary by the improvement alone, and this appellants contend is its only meaning and that a railroad company, just as any other landowner, under subsection 14, not by presenting a bill therefor, but by assessment by the viewers, is entitled to recover its damages, including the cost of a new bridge and the expense of closing its right of way, resultant from the drainage improvement; but we are unable to bring ourselves to this view of the meaning of the two sections, especially when considered in connection with subsections 11 and 12 of the act, the former of which provides for the adjustment of costs and benefits between the drainage board and the county or city authorities when a public highway is crossed, while section 12 provides for assessing the value of benefits against railroad companies, and section 13 for the allowance to them for such expenses as was thought proper, clearly indicating that the legislature meant to and dealt separately and differently with the damages resulting to public highways and railroads, from those incurred by other landowners; and that section 14 applies only to the last class, and has no application whatever to damages done either to public highways or railroads, so we conclude by subsection 13 of the act, the legislature expressly imposed upon railroad companies the expense of a new bridge and of "closing" its tracks, made necessary by the enlargement of a natural watercourse across its right of way.

As there is no cross-appeal and neither party is complaining of the lower court's ruling that so much of section 13 as authorizes the commissioners to deduct from the company's bill the cost of excavation done by them on the right of way is invalid, that question has not been considered and is not passed upon.

2. It is conceded by appellants that unless restrained by section 242 of the Constitution, the legislature had the power to place this entire expense upon the railroad companies, as was held by the Supreme court of the United

States in *C. B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 Law Ed. 596, upon a writ of error to the Supreme Court of Illinois, affirming the judgment of that court, holding a similar Illinois statute valid, and in which all questions of a violation of any provision of the Federal Constitution were eliminated; but it is insisted by counsel for appellants (1) that as the Supreme Court of the United States accepts as conclusive, unless violative of some provision of the Federal Constitution, the construction put upon state laws and constitutions by the state court of last resort, that opinion only forecloses federal questions and does not reach the question here, and (2) that because the provision of the Illinois Constitution dealing with the same subject is materially different from section 242 of our Constitution, the opinion of the Supreme Court of that state in the same case, 212 Ills. 103, is not authority here.

We shall consider the two propositions in the order stated, and while the first is technically true it is of no practical force since section 242 of the state's Constitution, though somewhat broader in that it requires compensation for injuries in the absence of a physical invasion, is in substance but the same guaranty to its citizens that the provisions of the Fourteenth Amendment of the Federal Constitution, resorted to by the railroad company and considered by the court in that case, vouchsafe to the citizens of every state in the union, as to their property rights; and therefore, when the federal Supreme Court decided that an Illinois statute, similar to ours and not in more convincing terms, expressly authorized the taking or injury or damage, whichever it was, of a railroad company's right of way, by a public drainage corporation without compensation; and that a valid exercise of such delegated power was an exercise of the state's police power, because it was an improvement of a portion of the state, so as to make it healthful and fit for habitation and cultivation, and therefore not within the protection of the federal guaranty to all of the people of the union in the enjoyment and possession of their property, that opinion is necessarily of the highest and most binding authority to the effect (1) that our statute is an express delegation of authority to the drainage commissioners to take or injure or damage the railroad company's property without adequate compensation, whenever necessary in the creation of a drainage district; and (2) that such a taking or injury or damage is not within the protection of the

similar guaranty of the state Constitution to its citizens as to their property rights, because it was an exercise of the state's police power. That opinion is so sound in reasoning and supported by such an abundance of authority that it would be a waste of time to do more than simply refer to it as conclusive authority that section 2380 of the statutes is an express delegation of the state's police power, and as such is not within the inhibition of section 242 of the Constitution.

But counsel argue that because in *City of Henderson v. McClain*, 102 Ky. 402, it was held that section 242 of our Constitution is an enlargement upon the guaranties of the Bill of Rights and the Fourteenth Amendment, so as to authorize a recovery for injury or damage where there was no taking or physical invasion, that any federal test of the validity of the law is not conclusive. This argument, however, is transparently unsound as applied here because the enlargement is of course of what theretofore existed, that is within the protection of the guaranties, but not of course to any case wholly without such protection, as is always the exercise of the state's police power. The consequences of counsel's conclusions are that under section 242 of the Constitution the state in the exercise of its police power may take, but can not injure or damage private property without compensation, the mere statement of which brings down at once the whole structure of their argument.

Counsels' second proposition stated above is also disposed of by the conclusions already reached, but in addition is the fact that in the case of *City of Henderson v. McClain*, *supra*, this court denied the truth of appellant's major premise by holding that the provision of the Illinois Constitution upon the same subject then in force, as well as when the Illinois case, *supra*, was decided, was substantially the same as our section 242.

The two cases from this court upon which appellants rely do not sustain, but rather refute their contention, since in the first, *L. & N. R. Co. v. Hopkins Co.*, 153 Ky. 718, the court assumes the legislature had the right in the exercise of its police power, to require a railroad company to abolish a grade crossing by building at its own expense an overhead bridge, but held the power as the county was attempting to exercise it had not been delegated, while in the other case, *L. & N. R. Co. v. City of Louisville*, 131 Ky. 128, an analogous claim for compensation for expenses incurred in erecting safety gates at

grade crossings, as required by city ordinance, was rejected upon the ground as stated in the opinion:

"It is generally considered that these duties, which are exacted in the exercise of the police power, a railroad company is not entitled to compensation for performing."

For the reasons indicated the judgment is affirmed.

Newton, Jr. v. Farris.

(Decided February 25, 1919.)

Appeal from Fulton Circuit Court.

1. Injunction—When Granted.—An injunction will not be granted unless it clearly appears that the complaining party will, unless it be granted, suffer great and irreparable injury that can not be adequately ascertained or compensated for in a suit for damages.
2. Injunction—Will Not Be Granted to Interfere With Pending Forcible Detainer Proceedings.—Where "A" instituted forcible detainer proceedings against "B" and "B" traversed the finding against him, "A" in a suit afterwards brought by him should not have an injunction to restrain "B" from using the premises in controversy in the forcible detainer proceedings.
3. Forcible Entry and Detainer—No Bar to Action for Trespass or Waste.—Under section 468 of the Code proceedings under a writ of forcible entry or detainer do not bar an action for trespass or waste, but in such an action an injunction should not be granted.
4. Forcible Entry and Detainer.—Where forcible detainer proceedings are pending in the circuit court on a traverse the plaintiff should not be allowed by an injunction while the forcible detainer proceedings are pending, to take possession of the premises that the defendant in the forcible detainer proceedings claims the right to the possession of.

R. B. FLATT for appellant.

W. J. WEBB for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL ON MOTION TO DISSOLVE INJUNCTION—Sustaining.

On January 8, 1919, Mrs. Farris obtained a writ of forcible detainer against George W. Newton, Sr., and George W. Newton, Jr., upon the ground that the Newtons were wrongfully detaining from her a tract of land containing about one hundred acres. On the trial

of the writ in the quarterly court on January 11 George W. Newton, Sr., was found not guilty and George W. Newton, Jr., was found guilty of the forcible detainer complained of. Thereupon George W. Newton, Jr., traversed the inquisition, executed the bond required by the Code, and when this suit in equity seeking an injunction was brought on January 22 by Mrs. Farris against George W. Newton, Jr., and the injunction I am asked to dissolve was issued by the circuit judge of the district the forcible detainer proceedings were pending on the traverse in the Fulton circuit court.

In this suit against George W. Newton, Jr., Mrs. Farris set out that she was the owner of and entitled to the possession of the one hundred acres of land, the same described in the forcible detainer proceedings, and that Newton was wrongfully holding possession thereof; that he was pasturing and feeding a lot of cattle on the land and threatened to continue in the use and possession of the premises; that by his acts in depriving her of the possession and use of the premises she had been damaged in the sum of one hundred dollars and would suffer great and irreparable injury unless Newton was restrained from trespassing on or interfering with her right to use and enjoy the premises. She asked that he be enjoined from trespassing upon the land or pasturing or feeding stock on the same or interfering with her full use and enjoyment thereof.

In answer to this suit Newton set up that he had rented the land for the year 1918 and was in possession of it during that year as the tenant of Mrs. Farris; that in the fall of the year 1918 he had rented it for the year 1919 and by virtue of his rental contract was entitled to the use and possession of the premises for the year 1919. In another paragraph he pleaded in bar of the injunction suit the forcible detainer proceedings pending in the circuit court.

For obvious reasons I will not express any opinion as to whether Newton is entitled to the use and possession of the land or any part thereof for the year 1919. It is sufficient to say that affidavits were filed by both parties in support of their respective contentions as made out in the pleadings in the injunction suit.

On hearing the case the circuit judge enjoined Newton, until further order of the court, from going upon or trespassing upon or pasturing the land and from inter-

fering in any way with the use and possession of the same by Mrs. Farris.

It will be observed that the only ground for injunction set out in the petition consisted in the fact that Newton was trespassing and continuing to trespass upon the land of Mrs. Farris by pasturing and feeding cattle and other stock thereon and preventing her from taking possession of and using the land as she wanted to, and on account of this conduct on his part she had and would sustain great and irreparable injury that could not be adequately compensated for in a suit for damages.

It is provided in section 468 of the Code that "The proceedings under a writ of forcible entry or detainer shall not bar an action for trespass or waste or rent or mesne profits." And so it is clear that Mrs. Farris, notwithstanding the pendency of the forcible detainer proceedings, had the right to bring an action for trespass as she did do against Newton, but the question is—Did she have the right in this suit to obtain an injunction? And this is the only question we are concerned with in this case.

As we have said, at the time this injunction suit was brought and the injunction obtained, the forcible detainer proceedings were pending in the circuit court and Newton had executed a traverse bond conditioned that he would pay to Mrs. Farris all damages caused to her by the traverse if not prosecuted with effect, and the terms of this bond are amply sufficient to cover any damages that Mrs. Farris may suffer by reason of Newton's wrongful detention of the premises, if it be determined that he is wrongfully detaining them.

In addition to this it is provided in section 467 of the Code that "The court before whom such cause (forcible detainer) may be pending, or any judge thereof in vacation, may restrain waste or destruction of the premises, and may enforce its order by fine and imprisonment or either." It will thus be seen that under these provisions of the Code the rights of Mrs. Farris may be fully protected in the forcible detainer proceedings, and this being so, it is very clear that she would not suffer any great or irreparable injury unless an injunction was granted, or any injury that could not be adequately compensated for in a suit for damages.

It is further manifest that if the plaintiff in forcible entry or detainer proceedings who has secured a verdict in the country that has been traversed by the defendant

could, while the traverse was pending in the circuit court, enjoin the defendant from using the premises in controversy, the effect would be to destroy what the defendant had secured by prosecuting his traverse, and we do not think that a party to a suit should be allowed in this way to defeat the rights of his adversary.

We have frequently written that an injunction should not be granted unless it clearly appears that the complaining party will, unless it be granted, suffer great and irreparable injury that cannot be adequately ascertained or compensated for in a suit for damages, and we have no state of case like this in the record before us. *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313; *Friedberg v. McClary*, 173 Ky. 579; *American Snuff Co. v. Walker*, 175 Ky. 149.

Under these circumstances I do not think the petition stated any ground for injunctive relief, and therefore the motion to dissolve the injunction is sustained.

Judges Settle, Hurt and Sampson heard this motion with me and concur in what I have said and in the conclusion reached.

Central Kentucky Gas Company v. Cantrell.

(Decided February 11, 1919.)

Appeal from Johnson Circuit Court.

1. **Master and Servant—Liability for Injuries to Servant.**—One who is engaged to shovel dirt from a ditch and over exerts himself and is injured, can not recover damages of the master because the servant is the best judge of his physical strength.
2. **Master and Servant—Liability for Injuries to Servant.**—The fact that the master assured the servant that he could lift the dirt from the bottom of the ditch and cast it upon the surface of the ground and that the servant, though protesting, returned to the work and was injured by overtaxing his strength, does not further the cause of the servant for the reason that the servant is better able to judge his own strength than is the master to judge the strength of the servant.

J. K. WELLS, W. B. WHITE and HAZELRIGG & HAZELRIGG
for appellant.

VAUGHAN & HOWES for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

The Central Kentucky Gas Company was engaged in excavating a deep ditch for the purpose of lowering its pipe line at a certain point in Johnson county, and appellee, Cantrell, with a number of other men, was aiding on the work. While so engaged Cantrell asserts that he so exerted and strained himself in his side and abdomen as to cause hernia, which has practically destroyed his power to perform labor and earn money. This action was instituted in the Johnson circuit court against the gas company to recover damages for the injury, and a trial resulted in a verdict and judgment for \$2,500.00 in favor of Cantrell, and the gas company appeals.

The tools with which Cantrell worked consisted of a common pick and a long-handle shovel. The ditch was about three feet wide at the top, ten or twelve feet deep and about 18 inches wide at the bottom. Cantrell commenced to work at the surface, and he and two companions jointly sank the ditch to the depth at which he was working at the time of his injury. He was standing on the bottom of the ditch using an ordinary long-handle shovel with which he was throwing the dirt out of the ditch on the top of the ground. There was no platform or other arrangement in the ditch for relaying the dirt, and this is the chief ground of Cantrell's complaint, because, he says, the plan adopted for the work by the master was not reasonably safe and not the method usually employed by reasonably prudent persons engaged in similar work. No complaint is made of the tools, or of the working place, except as aforesaid, and it would, therefore, appear that appellee Cantrell based his claim for damages upon the alleged negligence of the company in failing to provide platforms or other relay in the ditch upon which the dirt might be cast, and again taken up and thrown to the surface.

The gas company insists that the trial court erred to its prejudice in failing to sustain its motion, made at the conclusion of plaintiff's evidence and again at the conclusion of all the evidence, for a peremptory instruction to the jury to find and return a verdict for it, and this is the principal ground upon which it seeks a reversal of the judgment. If, as it contends, the facts of this case bring it within the rule that a servant is the best judge of

his own physical strength and the duty is on him not to overtax it, and if he misconceives the amount of strength required to accomplish a task given him, and overstrains himself, the master is not liable, then the court should have sustained its motion for peremptory instruction to the jury to find and return a verdict in its favor. While Cantrell testifies that he complained to the boss in charge of the work that the work was too hard and that scaffolds should be arranged in the ditch for relaying the dirt, and that the master assured him that he could do the work, and directed him to return to it before the injury, it appears that the injury which Cantrell sustained resulted from his attempting to lift more dirt on his shovel than he was physically able to lift to so great a distance, or from attempting to make a reaching lift beyond his strength. No one directed Cantrell how much dirt to lift with his shovel, and he was not required to take any particular quantity of dirt with any one motion of his shovel. Cantrell was the judge of the amount of dirt which he should gather on his shovel and lift to the surface. As the distance was great, it was Cantrell's duty to lift only so much dirt as his physical strength would admit without injury to himself. Having sunk the ditch from the surface, Cantrell knew more about the exertion required to lift the dirt from the bottom of the ditch to the surface than did the foreman, who had not worked in the ditch. It appears, therefore, that the rule applied in the case of *Cumberland Pipe Line Company v. Strong*, 175 Ky. 838, and the more recent case of *Harris v. C. N. O. & T. P. Ry. Co.*, 176 Ky. 846, controls this case. In the *Cumberland Pipe Line Company* case it was held that a workman who is injured in performing a duty ordered to be done by his superior, because of lack of physical strength, can not recover damages for injuries sustained thereby under the rule that there is no assumption of risk on the part of the servant in obeying an order of the master to do a particular thing, because the law, assuming that with respect to his physical strength the servant possesses a superior knowledge to that of the master, places upon the servant the duty of knowing his physical strength and of not overtaxing it.

In the case of *Harris v. C. N. O. & T. P. Ry. Co.*, this court held that a servant is the best judge of his own physical strength, and the duty is on him not to overtax it; if he misconceives the amount of strength required

to accomplish the task given him, and overstrains himself, the master is not liable. To the same effect are the following cases: *Sandy Valley & Elkhorn Ry. Co. v. Tackett*, 167 Ky. 756; *L. & N. R. R. Co. v. Sawyers*, 169 Ky. 671; *Wilson v. Chess & Wymond Co.*, 117 Ky. 567; *L. & N. R. R. Co. v. Boone*, 138 Ky. 700; *H. G. Nunnelley v. Prather*, 157 Ky. 157; *L. & N. R. R. Co. v. Williams*, 165 Ky. 393; 18 R. C. L., sec. 187

The master is sometimes held liable for injury to the servant when the master assures the servant that the place of work is safe, or that the tools or implements are in good condition, and this liability is rested upon the master's superior knowledge of the facts and conditions, but the master does not know and has no means of knowing the physical strength or endurance of a servant, except as he sees the servant exert it, yet the servant knows precisely his strength and when it is safe for him to undertake to do a certain work which requires exertion, and in such case the master is not made liable because of the assurance of safety, for the reason that the master does not possess superior knowledge, but that knowledge is in the possession of the servant.

The court erred in failing to direct the jury to find and return a verdict for the appellant company, and if upon another trial the evidence is in substance the same as upon the last trial, a motion for peremptory instruction by the defendant should be sustained.

Judgment reversed.

Breathitt County v. Hagins.

(Decided February 18, 1919.)

Appeal from Breathitt Circuit Court.

1. **Counties—Collection of Bridge Tolls.**—A county, which has not the right to collect tolls for the use of a bridge, and lets the privilege of collecting tolls to a lessee, who pays the rent into the treasury of the county, can not be sued for the tolls, by a citizen.
2. **Counties—Actions Against.**—A county is a political division of the state created for the administration of the government, and can not be sued by a citizen, unless express power is given to do so, by a statute, or an implied right is necessarily to be drawn

from an express power given, or unless the liability arises from an express contract, which the county has authority to make.

SOUTH STRONG, CHESTER GOURLEY and O. H. POLLARD
for appellant.

E. E. HOGG, T. T. COPE and A. F. BYRD for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

The county of Breathitt erected a bridge over a branch of the Kentucky river, which flows through the city of Jackson, which is the capital of the county. For a number of years, the fiscal court of the county, leased the right to collect tolls, from persons and vehicles, using the bridge, to the highest bidder, and the sums paid by the lessees, were turned into the treasury of the county and expended by its fiscal court, in defraying the necessary expenses of the county. On the 12th day of November, 1912, it was held, by a decision of this court, in the action of Breathitt County v. Hammond, et al., 150 Ky. 502, that the county of Breathitt did not have the right to require the payment of tolls by the individuals of the public, who used the bridge. Thereafter, the appellee, O. A. Hagins, instituted this action against the county, to recover from it the tolls, which he had paid for the use of the bridge during a great number of years. The county denied its liability and, also, interposed a plea of the five years statute of limitation. Before answering, however, the county demurred generally to appellee's cause of action, as stated, in his petition, but, the demurrer was overruled. The evidence upon the trial proved, that the fiscal court assuming the right to require the payment of tolls for the use of the bridge by the public, made orders, directing the leasing of the privilege of collecting tolls, for the use of the bridge, and entered into contracts with the lessees, who paid the sums agreed upon between them and the fiscal court for the right to collect tolls, into the county treasury and presumably were, thereafter, expended by the county, in the conduct of its fiscal affairs. The custodians of the county's funds, were not made parties to the suit, nor the lessees of the bridge, who collected the tolls. At the conclusion of the evidence offered upon the trial, the county moved the court to direct a verdict in its favor, but this motion was overruled. Instead, the court directed the jury to return a verdict for the sum of

\$528.00, in favor of appellee, which it did, and a judgment was rendered accordingly. From the judgment, the county has appealed.

It is not questioned, that if appellee had a right of recovery, at all, the judgment was for the proper amount, and the question of the right to sue the county and to recover upon the claim made by appellee, was presented, by his demurrer to the petition and upon his motion for a directed verdict. A county is only a *quasi* corporation and is distinguishable, so far as liabilities are concerned, from a private or municipal corporation, as a city or town. It is a political division of the state and a division for the purposes of government, and its activities, are, nearly, if not quite all, expended in matters of government, and in administering the sovereignties of the state, and for that reason, there are only a few things, for which a citizen may maintain a suit against the county. Being a portion of the state for governmental purposes, a county can not be sued, unless there is a statute, which expressly authorizes such an action to be maintained, or the right to do so, can be necessarily implied from an express power given, or it may be sued upon an express contract, which the county has authority to make. In accordance with this doctrine, it has been held, that an action can not be maintained against a county, for injuries sustained from neglect of its officials, in keeping public roads and bridges, in repair; nor for damages suffered by prisoners, on account of defective, unhealthy jails; nor for defects, in the buildings of the county, which cause injuries, although the negligence, of the officials of the county, was gross; nor can the county be made liable for a positive wrongful act of its officials, in connection with their duties as officials, unless the liability is imposed by statute either directly, or by necessary implication. Neither can a county be made liable to attorneys, who sue for a citizen, who maintains a suit for all taxpayers, and secured the return to the county of funds, which have been illegally disbursed. *Downing v. Mason County*, 87 Ky. 208; *Marion County v. Rives, etc.*, 133 Ky. 477; *Wheatley v. Mercer County, etc.*, 9 Bush, 704; *Hite v. Whitley Co.*, 91 Ky. 168; *Simmons v. Gregory*, 120 Ky. 116; *Moberly v. Carter*, 5 K. L. R. 694; *Shepherd v. Pulaski Co.*, 18 S. W. 15; *Sinkhorn v. Lexington, etc.*, 112 Ky. 205; *Hardwick v. Franklin*, 120 Ky. 78; *Coleman v. Eaker*, 111 Ky. 131; *Moss v. Rowlett*, 112

Ky. 121. As, further, illustration of this doctrine, when taxes have been wrongfully collected by county officials, the citizen, who has paid the taxes, may maintain a suit directly against the person, who has the money, from the collection of the taxes, in his possession, or for the purpose of distribution, and recover it, but, he can not maintain a suit against the county for it, after it has been paid out. Commonwealth, for, etc. v. Baske, etc., 124 Ky. 468; Com. v. Stone, 114 Ky. 511; Blair v. Carlisle, etc., Turnpike Co., 4 Bush 157; Whaley v. Com., 110 Ky. 154. In the instant case, the claim of appellee did not grow out of any express contract between him and the county, and the facts of the case upon principle can not be distinguished from a case of wrongful collection of an illegal tax. The appellee, in his petition, alleges, that the tolls were wrongfully collected from him. He paid the tolls, not to the county, but to a lessee of the county. His remedy was a proper proceeding against the individual, who was collecting the tolls to require him to cease, and for the recovery of any money paid, against the person, who had it. Under the authorities herein cited, he had no cause of action against the county. There is no statute, which expressly gives authority for his suit, nor is there any express power from which his right to maintain such a suit, can be implied. The case of Moore v. Lawrence County, 143 Ky. 448, cited by appellee, nor the earlier case of Layman v. Beeler, 24 K. L. R. 174, are authority for the maintenance of his action. Those were cases, wherein damages were suffered by individuals, from the actions of the county, in the construction of roads, and the authority for the liability of the county is found in section 242, of the Constitution. The counties are invested with the power of taking private property for public use in the construction of roads, and are required by that section of the Constitution, to make just compensation for the property taken, but, in the instant case, the county was not invested with the privilege of collecting tolls for the use of the bridge. Both the demurrer to the petition and the motion for a directed verdict, should have prevailed.

The judgment is therefore reversed and cause remanded for proceedings consistent with this opinion.

Bryant v. Jones.

(Decided February 18, 1919.)

Appeal from Whitley Circuit Court.

1. **Frauds, Statute of—Promise to Pay Debt of Another.**—A promise to pay the debt of another, which is founded upon a different consideration from the consideration of the debt, and the promise is not made to the creditor, is not within the statute of frauds.
2. **Contracts—Who May Sue Upon—Consideration.**—One for whose benefit a contract is made, may sue thereon, although he did not furnish the consideration.
3. **Husband and Wife—Guaranty and Suretyship.**—A married woman can not be bound, as a surety, and the only way she can undertake "to answer for the debt, default or misdoing of another," is to set apart her estate "by deed of mortgage or other conveyance," for the purpose of securing the payment of the liability.
4. **Husband and Wife—Guaranty and Suretyship.**—A married woman will not be bound for the debt of her husband, despite the form of the transaction, if the substance of it shows, that it is a mere assumption of the husband's debt.
5. **Husband and Wife—Guaranty and Suretyship.**—A married woman, who makes a promise to pay a debt, of her husband, in consideration of the sale and conveyance to her by the husband of a sufficient portion of his property to constitute a substantial consideration for the promise, and sufficient to induce it, will be bound by the promise, as such a transaction is not within the spirit and purpose of the prohibition of section 2127, Kentucky Statutes.

H. L. BRYANT for appellant.

R. L. POPE and H. B. BROWN for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

C. L. Jones, the husband of the appellee, Maud Jones, was the principal obligor, in a promissory note, which he owed to one Meadors, and the appellant, H. L. Bryant, was his surety, in the note. C. L. Jones, and his wife, Maude, were the joint owners of a house and lot in Williamsburg, and after the execution of the note to Meadors, by C. L. Jones, with the appellant, as his surety, and before the note became due, but, within twelve months of the time, upon which it would become due, C. L. Jones entered into a contract with Maud, by which she agreed, that in consideration of the sale and conveyance by him to her, of his one-half undivided interest, in the house and lot, that among other considerations for the con-

veyance, she would pay off and satisfy, the note, which he owed to Meadors, when it became due. In accordance with this contract, C. L. Jones conveyed his interest in the house and lot, to Maud, the deed, stating upon its face, that her agreement to satisfy the note, which Meadors held, was a part of the consideration for the sale and conveyance. When the note to Meadors became due, the appellee failed to satisfy it, and C. L. Jones, the principal, in the note, failing to pay it, the appellant, as his surety, was compelled to satisfy the note to the obligee. The appellant alleging in his petition, as amended, the above facts, and that the contract between Jones and his wife, by which she became the owner of the husband's interest, in the house and lot was made for his benefit, sought to make the appellee, personally liable to him, for the amount, which he was compelled to pay to Meadors, and procured a general order of attachment against her property, upon the ground, that she was a non-resident of the state, and caused it to be levied upon certain real estate, the property of appellee. The appellee interposed a general demurrer to the petition, as amended, which the court sustained, and appellant, electing to stand upon his petition, as amended, the court rendered a judgment, dismissing the petition, and discharging the attachment, and from this judgment, he has appealed.

The question for decision is, whether the petition, as amended, presented a cause of action, in favor of the appellant, the plaintiff, below.

(a) It is insisted, that although the contract, between appellee and her husband, was made for the benefit of appellant, as alleged, and to save him from the necessity of paying the note to Meadors, yet, the contract was one, which falls within the inhibition of subsection 4 of section 470, Ky. Stats., which provides, that "No action shall be brought to charge any person . . . upon a promise to answer for the debt, default or misdoing of another . . . unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note, thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent; . . ."

It will be observed, that the consideration for the promise made by appellee, to pay the note of her husband, was not the same consideration, as existed for the execution of the note, and the promise was not one made

to Meadors, the creditor of her husband, nor to appellant, as her husband's surety. Where the promise to pay a debt, which another owes, is founded upon a new and different and sufficient consideration, it is not within the statute of frauds, and is not required to be in writing. Besides, the statute, requiring a promise, in order to be enforceable, to be in writing, to pay a debt, which another owes, does not have reference nor apply to promises made to the debtor, but, the promises there declared invalid, are promises made to a person, to whom one is already obligated, or is to become obligated. *Spadone v. Reed*, etc., 7 Bush, 455; *Williams v. Rogers*, 14 Bush 776; *Noth v. Robinson*, 1 Duv. 71; *Botkin v. Middlesborough T. & L. Co.*, 23 K. L. R. 1964; *Creel v. Bell*, 2 J. J. M. 309; *Jennings v. Crider*, 2 Bush, 322; *Hodgkins v. Jackson*, 7 Bush, 342; *Mudd v. Carico Exr.*, 104 Ky. 719; *Daniels v. Gibson*, 20 K. L. R. 847. The consideration for the promise of appellee, being a one-half interest, in a house and lot, and not made to the creditor, but to the debtor, seems to take it out of the effect of the statute of frauds.

(b) The principle, that provides, that one, for whose benefit a contract is made, may sue thereon, although he is an entire stranger to the consideration, seems to have been thoroughly adopted, in this jurisdiction, and the promissor may be subjected to personal liability to the person for whose benefit the promise, upon a sufficient consideration, was made. *Benge v. Hiatt's Admr.*, 82 Ky. 666; *Whallen v. Judah*, 5 R. 316; *First National Bank, etc. v. Schussler*, 8 R. 516; *Smith v. Lewis*, 3 B. M. 229; *Blakely v. Adams*, 113 Ky. 392; *First National Bank, etc. v. Doherty*, 156 Ky. 386; *Allen v. Thomas*, 2 Met. 198; *Mize v. Barnes*, 78 Ky. 506.

(c) The appellee relies, chiefly, for support, for her insistence, that the plaintiff failed to state a cause of action against her, upon the provisions of section 2127 Ky. Stats., and the constructions placed upon that statute by former adjudications, and this, presents a question more serious and difficult of solution. So much of that statute as is pertinent to the question, here, is: "No part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract, made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose, by deed of mortgage or other conveyance; but her estate shall be

liable for her debts and responsibilities contracted after marriage, except as in this act provided."

It is insisted, that the contract, sued on, is one, by which a married woman contracted "to answer for the debt, default or misdoing of another," in which attempt, she could not make her estate liable to be subjected to that purpose, because she did not set apart any of it "by deed of mortgage or other conveyance," and for that reason, she is not personally liable. It may be conceded, that a married woman can not make herself liable personally, nor otherwise, as a surety for her husband, or as a surety for any one else. By the common law, a married woman could not bind herself personally, as a surety, and the act of March 16, 1894, of which section 2127, *supra*, is a part, does not empower her to become a surety. She is authorized, by the provisions of that act, to pledge her personal property, by "deed of mortgage or other conveyance" for the payment of the debt of another, and if her husband joins with her, she can "set apart" her real property by "deed of mortgage or other conveyance" to secure the debt of another, but, in neither instance, does she become a surety. By the provisions of section 2127, *supra*, however, a married woman's estate may be subjected for her debts and responsibilities contracted or incurred before marriage, and for all contracted or incurred after marriage, except a contract, "to answer for the debt, default or misdoing of another, including her husband," and in the latter case her property may be subjected, if she has set it apart, for the purpose as provided in the statute.

Section 2128, Ky. Stats., among other provisions, provides: "She (a married woman) may make contracts and sue and be sued, as a single woman, except, that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband joins in such contract; . . ." Hence, it appears, that she may not contract to become a surety, nor "to answer for the debt, default or misdoing of another," except in the way provided in section 2127, *supra*, nor can she make any executory contract to sell or convey or mortgage her real estate, unless her husband joins in such contract, but, any other contract, she may make, and sue and be sued, thereon, as a single woman may do. It follows, that for a breach of any contract which she may lawfully make, she is personally liable, and her estate may be subjected

to the liability. Hence, we are confronted with the question, whether the undertaking of the appellee, as set out in the petition, was a contract to answer for the debt of another, within the meaning of the statute, and therefore, one, which she could not make except in the manner set out in the statute, or was it simply a contract to answer for her own obligation, an independent contract from the debt of her husband, founded upon a sufficient consideration, and the inducement for making it, and for the performance of which she is responsible. If she had, instead of agreeing to pay the note, which her husband owed to the bank, agreed to, and paid him in money, as the consideration for the land sold and conveyed to her, by him, there could be no question of her right and power to do so, and the validity of the contract. The purpose of the statute was not to prohibit a married woman from making and performing contracts of her own, made for her own benefit, and the benefit of which she received, but, the purpose, was to protect her, and her estate against becoming bound for the debts and liabilities of others, and especially, those of her husband. While the statute of frauds, was not designed for the same purposes as the statute, under consideration, section 2127, *supra*, the language of the two, is very similar. The statute of frauds, provides, that one may not be bound "to answer for the debt, default or misdoing of another," unless he promises to do so, in a writing subscribed by him, while section 2127, *supra*, provides, that the estate of a married woman shall not be subjected to the payment or satisfaction of any liability, upon a contract made after marriage "to answer for the debt, default or misdoing" of another, unless she shall have set apart such estate "by deed of mortgage or other conveyance, etc." The two statutes being designed for different purposes, the one, applying to the rights of a married woman, can not, in all respects, be construed by analogies from the constructions placed upon the statute of frauds, and the prohibitions of the former statute, are much more general and sweeping, than those of the latter, but, the constructions placed upon the meaning of the words, "to answer for the debt, default or misdoing of another," in the latter statute, are helpful to determine, when a contract is "to answer for the debt, default or misdoing of another," as used in the former statute. Under the statute of frauds, which makes unenforceable, a contract "to answer for the debt, default or

misdoing of another," unless the promise to do so, is in writing and signed by the person to be charged, as, is heretofore shown, a promise to pay the debt of another, not made to the one to whom the debt is owing and founded upon a different consideration from that, upon which the debt, promised to be paid, is based, is not within that statute, and is not required to be in writing to be enforceable. In other words, it is an independent contract and based upon a different consideration. Under the statute of frauds, when one, by promising to pay the debt of another, procured the creditor to release the other, from all liability, the promise was not within the statute of frauds, although made to the creditor. *Day v. Cloe*, 4 Bush 563; *Fain v. Turner*, 96 Ky. 634; *Wagner v. The Bells*, 4 Mon. 8; *Leiber v. Levy*, 3 Met. 292; *Jones v. Walker*, 13 B. M. 357; *Myles v. Myles*, 6 Bush, 237. In these cases, the holding was upon the theory, that the promise, was to pay absolutely, and not on condition of any default or misdoing of another. But, we have held, that under section 2127, *supra*, a wife can not assume the debt of her husband and be made liable upon the promise, although she executes her promissory note, when there was no other consideration for her promise, than the release of her husband, from further obligation. *Deposit Bank of Carlisle v. Stitt*, 107 Ky. 49; *Russell v. Rice*, 19 K. L. R. 1613; *Crumbaugh v. Postell*, 20 K. L. R. 1366; 49 S. W. 334; *Milburn v. Jackson*, 21 K. L. R. 700; *Third National Bank v. Tierney*, 128 Ky. 836. The reason for this holding, is apparent. To permit such a result as would be accomplished, by the release of the husband and the binding of the wife, without other consideration, than his release, and no beneficial result to the wife, would be, to give sanction to the very thing, which it is the purpose of the statute, to prevent, and would amount to a mere evasion of the statute. It has, also, been held, that where a wife has executed her note for a loan, which the creditor knew was for the husband and was, in fact, the debt of the husband, such a transaction did not bind the wife, but was within the prohibition of the statute. Section 2127, *supra*, has been construed, in many other cases, and the language used in the opinions, must be read, in the light of the particular facts, in each case, but, it may be gathered from the opinions, that the rule applicable to all transactions, in which a married woman assumes the debt of another, is, that she can not do so, and will not be

personally liable, and her estate will not be liable, except to the extent, she sets it apart for that purpose by "deed of mortgage or other conveyance." Neither will an arrangement, which amounts to a mere evasion of the spirit of the statute, and where the result accomplished, is a substantial assumption, of the debt of another by a married woman, without a sufficient consideration, to make it an independent contract of her own, it will not be allowed to prevail. In the determination of whether the promise of the wife is within the statute, the court will not regard the mere form of the transaction or the sheer *camouflage* thrown about it, but, will look into the substance of the transaction. *Tipton v. Traders Deposit Bank*, 17 K. L. R. 960; *New Farmers Bank, etc. v. Blythe, etc.*, 21 K. L. R. 1035; *Hart v. Bank of Russellville*, 127 Ky. 424; *Hines v. Hays*, 26 K. L. R. 967, 82 S. W. 1007; *Black v. McCarley*, 31 K. L. R. 1198; *Planters Bank v. Mayor*, 25 K. L. R. 702; *Tompkins v. Triplett*, 110 Ky. 824; *Hall v. Hall*, 118 Ky. 656; *Deering v. Veal*, 25 K. L. R. 1809; *Morrison v. Morrison*, 113 Ky. 507; *N. Y. L. Insurance Co. v. Miller*, 56 S. W. 975; *Brady v. Equitable Trust Co.*, 178 Ky. 693. The facts, of the instant case, as presented by the pleadings, are different from any of the cases, above cited. The purpose evinced, is not the assumption of the husband's debt, or to pay it, upon the condition, that he fails to do so, as the wife would do, as a surety, but, it is a contract for the purchase of the husband's real estate, and the promise to pay, unconditionally, the husband's debt as the purchase price. It must be assumed, upon demurrer, that the consideration for the promise, was sufficient, and the inducement for the contract. The promise was not to the creditor. The consideration for the promise, was a new and different consideration from the one, upon which the execution of the note was based. Hence, the promise is not one "to answer for the debt, default or misdoing of another," within the spirit and meaning of the prohibition of the statute. It seems to be a contract, so far as concerns the wife, entirely independent and unconnected with the contract between the husband and Meadors, and founded upon a substantial consideration received by her.

The judgment is therefore reversed, and cause remanded with directions to set aside the judgment, and overrule the demurrer, and for further proceedings, not inconsistent herewith.

Irvine, et al. v. Stevenson, et al.

(Decided February 18, 1919.)

Appeal from Madison Circuit Court.

1. **Guardian and Ward—Employment of Attorneys—Services.**—A guardian is authorized to employ attorneys to prosecute and defend actions for his wards, and to bind their estates to pay a reasonable fee for the services of the attorneys.
2. **Guardian and Ward—Payment of Attorneys' Fees.**—Before the estate of an infant can be subjected to the payment of counsel fees, upon a contract with the guardian, it must appear, that the services were actually rendered, and that they were reasonably necessary for the protection of the interests of the infants, and that the sums charged, are reasonable and not disproportionate to the value of the services rendered.
3. **Guardian and Ward—Allowance of Attorneys' Fees.**—The amount allowed for counsel fees, against the estate of an infant, will not be increased on account of the number of attorneys engaged, but, the court will fix a sum for payment for the necessary legal services rendered, and apportion it between the attorneys, as may be equitable.
4. **Guardian and Ward—Payment of Attorneys' Fees.**—Where attorneys defend an action for wards, by contract, with the guardian, and the guardian pays them, he will be allowed credits in his settlement by the sums paid, if the services of an attorney were reasonably necessary, and the sums paid, were reasonably proportionate to the value of the services, but, in the event the guardian fails to pay for the services, the attorneys may subject the estate of the wards to the satisfaction of their debts, by a suit in equity, in which all the parties, in interest, are made parties.
5. **Attorney and Client—Compensation.**—In fixing the compensation due an attorney, for legal services, the amount and character of the service rendered, the nature and importance of the litigation, the amount and value of the property, in contest, the skill necessary to properly attend to the business, and the professional standing and skill of the attorney may be looked to, together with the time, labor and trouble expended.

G. MURRAY SMITH for appellants.

J. J. GREENLEAF and JOHN NOLAND for appellees.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

Harry Crawford, died intestate, on the 10th day of February, 1911, leaving, surviving him, a daughter, Mollie Black, who was the wife of General E. Black, and the mother of an infant son, Harry Crawford Black.

Bettie Irvine was the mother of two illegitimate sons, William Irvine, and Marcus Irvine, whom she claimed, were the natural children of Harry Crawford. William Irvine and Marcus Irvine were then, and are now, infants. On the 27th day of October, 1908, Harry Crawford executed a deed to Mollie Black and her son, Harry Crawford Black, by which, he conveyed to them, a farm, containing three hundred acres, in Clark county. He instituted a proceeding in the Clark circuit court, for the purpose of adopting William Irvine and Marcus Irvine, as his heirs, at law. On September 23rd, 1909, he executed a deed, by which, he conveyed, to his daughter, Mollie Black, and his grandson, Harry Crawford Black, one-third of seven hundred and eighty-one acres of land, in Madison county, and on the same day, he conveyed two-thirds of the seven hundred and eighty-one acres, in Madison county, to William Irvine and Marcus Irvine. He conveyed to each of them, a certain portion of the lands, but, with the condition, that in the event of the death of either, without issue, before arriving at the age of twenty-one years, the interest, conveyed to him, should pass to the other.

Following the execution of the deeds, on the 30th day of September, 1909, a judgment was rendered, in the proceeding, by Harry Crawford, to adopt the two Irvine children, as his heirs, granting the relief asked.

After the death of Crawford, the lands in Madison county, were divided between Mollie Black and her son, and the two Irvines, and deeds were made, under a judgment of the circuit court, by which the commissioner of the court, conveyed to William Irvine, 281.62 acres of the lands, and to Marcus Irvine, 221.12, acres of the lands. Bettie Irvine was appointed and qualified, as the statutory guardian of William and Marcus Irvine, and as such, had in her hands, a promissory note, for the sum of \$8,619.76, of which the interest owned by one of her wards, was, \$4,277.40, and the interest owned by the other, was \$4,342.36, all of which they received as the heirs, by adoption, of Harry Crawford.

Thereafter, in February, 1915, one Anna Karnes, claiming to be a legitimate daughter of Harry Crawford, instituted suit, in the Clark circuit court, against Mollie Black, Harry Crawford Black, Bettie Irvine, as guardian, and her two wards, William Irvine and Marcus Irvine, and by which, she claimed, that she and Mollie

Black were the only heirs of Harry Crawford, and that as such, each was entitled to one-half of his estate; that the deeds made by Crawford, by which, he had conveyed the lands, previous to his death, were invalid, because they were made at a time, when he was mentally incapable of knowing what he did, or the force or effect of his acts; that he was unduly influenced to secure the decree of the Clark circuit court, by which William and Marcus Irvine were adopted, as his heirs, by the exercise of an undue influence upon him by Bettie Irvine, at a time, when he was decrepit in health, and mentally incapable of knowing the character or quality of his acts, and prayed, that the decree of adoption be declared void, and that the deeds executed to them, by Harry Crawford, be cancelled and declared void, and that the personal property, in the hands of their guardian, and all the real estate of which Harry Crawford died the owner, and that, which he had conveyed to Mollie Black and her son, and to William and Marcus Irvine, be divided, equally, between Mollie Black and herself.

Bettie Irvine, as the guardian for William and Marcus Irvine, contracted with two lawyers, J. M. Stevenson, and J. C. Chenault, to represent her as guardian, and to defend the action for her wards. The contract was reduced to writing and signed by the parties, and by its terms, it was agreed, that the lawyers would attend to the preparation of the defense to the case, and to take all necessary legal steps for the protection of the interests of the wards, in the circuit court, and in the event of an adverse judgment, would prosecute an appeal to the Court of Appeals. A retainer of \$100.00 was to be paid, and the lawyers were, also, to be paid fees, to be agreed upon by the parties, and if an agreement could not be made, then, the fees, should be fixed by the judge of the court, or the Madison county court. The lawyers were, also, to be paid their actual expenses incurred in the preparation of the action for trial. On the 4th day of April, 1916, the action ended, by an agreed judgment of the circuit court, by which the action was dismissed and each party was adjudged to pay the costs created by him. Afterward, a motion was made, by the plaintiff, to set aside the judgment, but, this motion was defeated and overruled. Under its terms, the contract of employment of the attorneys, thus ended. *Ball v. Lively*, 2 J. J. M. 181. *Richardson v. Talbott*, 2 Bibb, 382.

Stevenson and the guardian, then, agreed upon a fee to be paid to Stevenson of \$2,500.00 for his services, but, Chenault and the guardian were unable to agree, and the guardian failed to perform the agreement made with Stevenson.

This action was brought by Stevenson, against William and Marcus Irvine, and Bettie Irvine, as their guardian, to recover against the estates of the infants, and to be paid out of their estate, a fee for his services, in defending the suit of Karnes, against them, in the sum of \$2,500.00 and \$85.00, his actual expenses, in the preparation of the action for trial. John C. Chenault was made a party defendant, and by a cross-petition, set up a claim for his fees, in the same cause, and his actual expenses. The petition described the real estate and personal property owned by each of the infants, and asserted a lien, thereon, to secure the payment of the fee, sued for, and the cross-petition of Chenault, contained similar averments. The guardian, by answer, put in issue the reasonableness of the amounts of the fees sued for, and denied the accounts for expenses, and thereafter, offered to confess a judgment for \$1,250.00 to Stevenson, and a like sum, in favor of the cross-petitioner, Chenault, with certain sums, theretofore paid, to be deducted.

The court, after hearing a large quantity of evidence, fixed the amount of the recovery, in favor of Stevenson, for his services and expenses, at \$2,085.00, and in favor of Chenault, the sum of \$942.00 for his services and expenses, deducting sums, already paid. It was, further adjudged, that the estate, of each infant, was to pay one-half of the sums for which a recovery was adjudged and that their estates were bound for the payment, and for the purpose of enforcing the payments, that the note, in the hands of the guardian, should be sold, in satisfaction of the judgment, and if from the sale of the note, a sufficient sum to pay the judgment, was not realized, then, a sufficiency of the real estate of the infants to finish satisfaction of the judgments, should be sold. From this judgment, the infants, by their guardian, have appealed to this court, and seek its reversal, upon three grounds:

(1) The court erred in allowing a separate fee, in favor of each plaintiff, instead of allowing one fee, in favor of both plaintiffs.

(2) The fees allowed, were unreasonable in amount and disproportionate to the value of the services rendered.

(3) The manner directed by the court for the enforcement of the judgment, was oppressive, and erroneous.

The grounds of reversal will be considered in their order.

(a) A guardian, in the defense of a suit against his wards, is not confined to the employment of one attorney, but may engage more than one, or more than one partnership of attorneys, if the character of the litigation, the services to be performed, and the interests in controversy, make reasonably necessary, the services of more than one attorney to properly safeguard and protect the interests and rights of the wards, and if the guardian pays the attorneys, for their services rendered, out of the estate of the ward, he will be allowed credits for such payments, in a settlement of his accounts as guardian, if it shall appear, that the services, paid for, were actually performed, under contracts, with the guardian, by persons authorized to practice law in the courts and of recognized skill in the law, and if it shall, further appear, that the services, were reasonably necessary to protect the interest of the infant wards and the sums paid, were not in excess of the reasonable value of the services. *Chapline v. Moore*, 7 Mon. 150. The credits are allowed, the guardian, because the court should approve, in this particular, when done, what it would have directed to be done, if applied to, beforehand. An infant, however, being unable to contract for himself, it is the duty of the court, to guard his interests, and whether there be one or many lawyers engaged in representing him, his estate should not be required to pay more for legal services, than the reasonable value of the services, reasonably necessary to protect his estate. Section 2030 Ky. Stats. empowers a guardian to prosecute and defend actions for his ward, and it was held, in *Sears v. Collie*, 148 Ky. 444; and in *Wilhelm v. Hendrick*, 167 Ky. 219, that the right and duty of a guardian to prosecute and defend actions for his ward, including the right to employ persons, learned in the law and authorized to practice the profession, to assist him in properly protecting the interests of the ward, and to bind the estate of the ward for the payment of a reasonable fee to the lawyer, for his services. For

the defense of the estates of the two wards, in the instant case, the guardian contracted for the services of two attorneys, and after the contract of employment had been performed, she and one of them agreed upon the compensation to be paid to him, but this agreement as to the compensation to be received by this attorney, would not be binding upon the estates of her wards, except in the event, it was shown, that the services claimed to have been rendered by him, were rendered, and that the services were necessary, and the compensation was reasonably proportionate to the value of the services. With the other attorney, the guardian failed to agree upon the sum of his compensation, and did not pay the first, the sum agreed upon. It does not appear, that the attorneys rendered an equal amount of services, and in such a state of case, it is apparent, that a court of equity, when called upon to determine the allowance to be made for counsel fees, should determine, under all the facts of the case, what amount, the allowance for counsel fees, should be, and then, apportion it between the attorneys, according to what was equitable. To do this, the court, should have before it, the different attorneys, who rendered services, for which, the allowance is made. All the parties, in interest, in the case, were brought before the court, and the court, thus, had before it, the entire subject of counsel fees for the infants, in the litigation. Principles analogous to those, herein expressed, were declared in *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, and *McKee's Admr. v. Ward, etc.*, 18 K. L. R. 987, 38 S. W. 704. In those cases, the rights of attorneys, as against the estates of lunatics, were being considered, but, there appears to be no reason, why the same principles should not apply to similar claims against the estate of an infant, who is legally incapacitated to make a contract.

(b) The entire estate of both the infants, was put in jeopardy by the suit. If their defense did not prevail, their entire estates, were lost, and the attorneys, would not receive anything for their services. The lands held by the infants and which were involved, in the litigation were from the sum of \$21,000.00 to \$25,000.00 in value; their personal estate, involved, exceeded \$8,000.00. The action was pending about thirteen months. Several able and energetic attorneys, represented the plaintiff, in the action. For the purpose of taking proof, and cross-examining witnesses, and investigating the facts bearing

upon the controversy, it was necessary for the infants' attorneys, to visit Breathitt county, a number of times, and in doing so, and attending the Clark circuit court in defense of the action, Chenault spent fifty-six days, and in addition, much time and labor, in his office. One hundred and forty-four witnesses were examined and cross-examined. The depositions filled fourteen hundred typewritten pages. One hundred and twenty letters were written. Many days were consumed in consultation with clients and witnesses. In addition to all the depositions, above mentioned, which were taken upon the issue, as to whether the plaintiff was a legitimate daughter of Harry Crawford, the attorneys, for the infants, investigated the facts upon the issues made, as to the competency of Crawford to execute the deeds, sought to be set aside, and prosecute the suit for the adoption of the infants, and whether or not he was moved to execute the deeds or to secure the adoption by any undue influence and prepared the defense upon those issues. That the services for the infants, were necessary to the protection of their estates, there does not seem to be any doubt. That the services were in good faith and faithfully and intelligently rendered, there is no doubt. In an employment for an infant, the law provides, that the charges of an attorney must be reasonable, and in determining the compensation to which he is entitled, the amount and character of the service rendered, the nature and importance of the litigation, the amount and value of the property, in controversy, the skill necessary to properly attend to the business, and the professional standing of the attorney, as well as the time and labor and trouble expended, may be considered. *Morehead's Trustee v. Anderson*, 125 Ky. 87; *Downing v. Mayor*, 2 Dana 228. \$3,000.00 was not an unreasonable sum to allow for necessary legal services for the infants, in this case, and the court, by its judgment, apportioned \$2,000.00 of it to Stevenson and \$1,000.00 to Chenault, and neither of them is complaining of the apportionment.

(c) Section 2031 Ky. Stats. authorizes a guardian to sell the personal estate of his ward, and the court might have properly ordered the guardian to sell the personal estate in her hands and pay the debts due the attorneys, instead of directing its commissioner to do so, but the result would have been the same and the same end would

have been accomplished, by indirection, as was ordered by the judgment to be directly done. The right of the guardian to have sold the personal estate in her hands, was not denied by the judgment, and she might have done so, and satisfied the judgment, in which event, no sale could have been made. Subsection 2 of section 489, Civil Code, authorizes a court of equity, to sell the vested interest of an infant in real estate to pay his liability or debt to a creditor. The guardian can not sell the real estate of his ward, nor can the court authorize him to do so, except to pay the debts of the ward's ancestor. It is true, an attorney does not have, by reason of section 107 Ky. Stats. a lien upon property of his client, which he has successfully resisted the taking away, by an adversary claimant, who sues for it.

The attorney has a lien only on property, which his client recovers, in the action. *Lytle v. Bach*, etc., 29 K. L. R. 424; *Thompson v. Thompson*, 23 K. L. R. 1535; *Forrester v. Howard*, 124 Ky. 215; *Hatfield v. Richmond*, 177 Ky. 183. The attorneys' fees, however, in the instant case, were a liability for which the infant defendants' estates, were bound, and there was no other proper way for the attorneys to subject it to their demands, except by a suit in equity against the guardian and wards, wherein the court in the exercise of its authority, may subject it to the payment of the debts of the ward. *Wilhelm v. Hendrick*, 167 Ky. 219. This course, was the one, pursued.

The judgment, is therefore, affirmed.

Tegtmier v. City of Covington.

(Decided February 18, 1919.)

Appeal from Kenton Circuit Court
(Criminal, Common Law and Equity Division).

Municipal Corporations—Construction of Streets—Closing to Travel.—A municipality has power and authority while constructing or reconstructing its streets, or any part thereof, to blockade and close the same to travel; and where such blockade is made by the erection of suitable barriers which, at night, are indicated by red signal lights in such way as to notify travelers, exercising reasonable care, that the street, or that part of it, is closed to

travel, the city is not liable to a pedestrian who is injured by falling into an excavation so barricaded.

ROBERT C. SIMMONS for appellant.

A. E. STRICKLETT and JOHN A. RICHMOND for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

This action was instituted in the Kenton circuit court by Lily Tegtmier to recover damages for personal injuries, incurred by a fall on Johnson street, in the city of Covington. The petition avers that the city, through a contractor, was reconstructing the street at the point where the injury occurred, and had excavated a ditch or hole several inches deep, which had been left unguarded and without signal or warning; and that appellee, while traveling along the street after dark, and exercising care for her own protection, stepped into the excavation, precipitating her fall which resulted in the injuries of which she complains. The answer denies that appellant was injured, or that the street had been excavated, or that any excavation had been left unguarded or without signal and warning. It also pleaded contributory negligence. The reply controverted the affirmative allegations of the answer. Upon a trial before a jury the verdict was for appellee city, and Miss Tegtmier prosecutes this appeal.

Appellee urges but one ground for reversal, and that is that the court erroneously gave an instruction offered by appellee in substance telling the jury to find for defendant city if it believed from the evidence that "there was signal lights, or a signal light, or barricade at the place plaintiff attempted to cross the street," which was of sufficient size and character to warn a person exercising ordinary care of the danger from the excavation. It is urged that there was no evidence upon which to base the instruction, and it is conceded that had there been evidence tending to show the existence of signal lights or barricades at the place the young lady was injured, this instruction would have been proper. Miss Tegtmier testified as follows; "Q. What did you notice there, if anything? A. Some bricks and things. Q. What was the bricks and things? A. It had been raining so hard and I knew nothing of the digging any gutter, and the water was flowing over, there was not any dirt or rocks or any-

thing that they had been digging there. . . . I said my foot felt like it was slipping; it felt like I went into something; I do not know what it was. I did not know about this digging. Q. You did not see any digging yourself? A. No, sir. Q. When you put your right foot down, you stepped on what you thought was the edge, rock, or whatever it was, and your foot gave way? A. Yes, sir. . . . Q. I understand you to say that your foot stepped into something. Mr. Schmitz asked you if your foot turned? A. No, my foot did not turn. I just stepped down and before I knew it I was on the ground. . . . Q. Please state whether or not there was any light of any kind to indicate the presence of this place? A. There was nothing there to indicate that they had been digging. Q. Where was the electric light? A. There was an arc light at the corner. Q. Was that burning? A. Yes, sir."

The witness, Rosa Frendel, gave the following testimony; "Q. Were you out on the street that evening? A. Yes, sir, after the storm. Q. What sort of storm was it? A. Rain storm; heavy rain. Q. Did you see any light on this job? A. After the rain I went out in the yard and I noticed there was a light at the alley but none at Third and Johnson. Q. Where is the alley? A. Between Third and Fourth streets. Q. How far is it from the two streets? A. About four houses from Third. . . . Q. And there was a light there? A. Yes, sir. Q. How was this earth there at Third and Johnson? A. They did not throw it out right at the spot where they dug it up. Q. How far was it away? A. Three or four feet. . . . Q. You saw a light? A. Yes, sir, at the alley. Q. Where was it placed? A. Right on a pile of dirt. Q. Where? A. At the corner of the alley. Q. Where with reference to the street or sidewalk? A. Well, it was on a pile of dirt near the alley. Q. Was the dirt in the street? A. Yes, sir. Q. What kind of a lantern was it? A. It was a red light. Q. Was that the only one you saw? A. Yes, sir, that was the only one. Q. How far did the digging extend towards the alley at that time? A. All the way up."

The witness, Fred Tegtmier, who examined the premises immediately after the accident, testified as follows: "Q. State what you saw with reference to lights, if anything? A. There was only one light right at the head of Stewart street; that was all the lights. . . . Q. Did you see the lantern there? A No, sir, no lantern there. Q.

Where did you see any lantern if you saw any? A. Right at the head of Stewart street."

Then the witness, Remley, testified as follows: "Q. Was there any provision made, that is any lights placed there? A. The first night there was a light there and some pieces laid across, and the second night I do not know; Mr. Tegtmier asked me that. I did not pay any attention to the second night whether there was a signal there. Q. But the first night there was a light at the end of the rock near the brick pavement? A. Yes, sir. Q. Was it burning? A. Yes, sir. Q. And there was boxes arranged there to barricade the place? A. No, sir; as well as I remember there were pieces of timber laying across some rocks and the light on top. Q. The first night? A. Yes, sir. Q. What kind of light? A. A red signal light. Q. And noticed the lights around there of evenings and morning near your store? A. Yes, sir. Q. And you noticed the barricades there? A. No, sir. Q. Didn't you give Mr. Ramsey some boxes to make a barricade with? A. Probably I did; I do not remember it. Q. You noticed the lights the day they started? You did not notice them the second day, but you did notice them for quite a while after that? A. Yes, sir."

A municipality has power and authority while building or rebuilding a street, or any part thereof, to blockade and close the same to travel; and where such blockade is made by the erection of suitable barriers, which are indicated at night by a signal light or lights, in or across the street in such way as to notify travelers that the street or that part of it is closed to travel, and to warn pedestrians, exercising ordinary care, that the street at that point is closed to travel, a traveler injured thereon, through defects in the street, is without remedy, and the city will not be held liable for damages. *Knepfle v. Laufer*, 182 Ky. 514; *Commonwealth v. I. C. R. Co.*, 138 Ky. 749; *Barrickman v. City of Louisville*, 167 S. W. 151.

If the excavation into which Miss Tegtmier slipped and fell, if she did slip and fall, was guarded and protected by barricades on which a red signal light or lights were at the time of the injury, and the barricades and lights were of such size and conspicuousness as to have warned a reasonably prudent person of the existence of the excavation, then she was not entitled to recover, and the instruction complained of was properly given. After

going through the record carefully we are left in doubt as to whether the evidence introduced by the plaintiff was sufficient to warrant an instruction on the subject. There is, however, some evidence tending to prove that the excavation was guarded by barriers and indicated by signal lights. This evidence, meager though it be, was perhaps sufficient to have warranted the trial court in giving instruction No. 2½, of which complaint is made. Under the facts of the case we are unable to say that the jury was misled to the prejudice of the appellant. We do not regard the giving of the instruction, when considered in connection with other instructions and the evidence, as prejudicial error.

Judgment affirmed.

Hazard Dean Coal Co., et al. v. McIntosh, et al.

(Decided February 18, 1919.)

Appeal from Perry Circuit Court.

1. Eminent Domain—Taking Private Property for Public Use—Compensation.—Constitution, section 13, Bill of Rights, and section 242, which declare municipal and other corporations and individuals invested with the privilege of taking private property for public use, "shall make just compensation for the property taken, injured or destroyed by them," applies to the building without right of a fill for a railroad on the land of another, or the obstructing of the means of ingress and egress to and from his land.
2. Trespass—Liability for Injury from Invasion of Property.—A vendee or lessee of real estate is not exempt from liability for an injury that results from an invasion of another's property, where his possession is based upon no other title than a tortious entry by his vendor, as in such case the act of the vendor in appropriating the property being wrongful, that of the vendee in retaining possession of the property is equally so.
3. Trespass—Wrongful Transfer of Property—Compensation.—The party originally wrongfully taking or occupying the property, can not transfer to another by lease or otherwise any right in the property, except subject to the duty to make compensation therefor.
4. Trespass—Measure of Damages—Instructions.—Where there is a wrongful taking of land constituting a trespass, the wrongful taker thereof cannot complain that the trial court in instructing the jury as to the measure of damages, did not give the measure applicable to the taking of the land by condemnation proceed-

ings; nor in such case was there any error in instructing the jury that the measure of damages was the same as applicable in a case of trespass to realty.

5. **Appeal and Error—Instructions.**—The refusal of an instruction offered, however correct may be its form or substance, is not error, if the matter thereof is substantially contained in another that the court gave.

JOHN B. EVERSOLE and MORGAN & NUCKOLS for appellant.

J. E. JOHNSON, HOGG & JOHNSON, F. J. EVERSOLE and MILLER, WHEELER & CRAFT for appellee, D. Y. Combs.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This action was instituted April 2, 1914, in the Perry circuit court against the Hazard Dean Coal Co., and the Lexington & Eastern Railway Co., by Jane McIntosh and Jerry McIntosh, her husband, to recover of them damages for their alleged unlawful taking of parts, and injuring the remainder, of a tract of land belonging to Jane McIntosh and appropriating the parts taken for the bed and right of way of a railroad which the defendants constructed and the defendant, Hazard Dean Coal Co., was operating at or near the town of Hazard, between its coal mine and the main line of the Lexington & Eastern Railway Co. It was alleged in the petition that the defendants had been duly incorporated and were doing business under the laws of this state, that of the former being the mining and marketing of coal, and of the latter a common carrier. By an amended petition, filed nearly a year later, the Bluegrass Coal Co., a corporation also created under the laws of this state, was made a defendant and judgment sought against it on the same grounds relied on for the recovery against the Hazard Dean Coal Co., it being alleged in the petition that the Bluegrass Coal Co. had, since the institution of the action, leased from the Hazard Dean Coal Co. its coal mine and railroad and with the railroad yet holds the land of the plaintiffs, thereby continuing the wrongs first committed by its lessor in unlawfully taking and appropriating it.

The defendants filed separate answers, that of the Hazard Dean Coal Co. admitting construction of the railroad on the land claimed by Mrs. McIntosh, described in the petition, but denying her ownership of it and the unlawful taking thereof; also the allegations as to damages contained in the petition, and alleging that the right

of way and bed for its railroad upon and over the land in question, was procured by purchase from the owner, Jane McIntosh, by one D. Y. Combs, under a written contract which Combs had made with its vendors, W. M. Jones and others, whereby he obligated himself to obtain the entire right of way and bed for the railroad. The answer was made a cross-petition against Combs to the end, that in the event the plaintiffs recovered damages against the Hazard Dean Coal Co. for the wrongs complained of the latter might, in turn, recover the same of Combs; and such was the prayer of the cross-petition. The answer of the Lexington & Eastern Railway Co. simply traversed the averments of the petition. Combs' answer to the cross-petition of the Hazard Dean Coal Co. also traversed its allegations. The answer of the Bluegrass Coal Co. admitted its purchase of the lease, coal properties and railroad of the Hazard Dean Coal Co., but denied the allegations of the amended petition as to the plaintiffs' ownership of the land claimed and the wrongful taking of same by its lessors; also denied any liability on its part for such taking of the land or its own continuance of the use thereof; and reiterated the allegations of the answer of the Hazard Dean Coal Co. as to Combs' procurement of plaintiffs' land for its railroad bed and right of way and, as did that company, made its answer a cross-petition against Combs, who answered controverting all affirmative matter of the cross-petition. Numerous other pleadings, responsive and by way of amendment, were filed by the parties, which we will not notice, as it is believed what has been said will suffice to indicate the issues of law and fact made by the pleadings. Jane McIntosh died shortly after the institution of the action and by a proper order the action was revived in the name of her personal representative and heirs at law.

On the trial in the court below the jury returned a verdict awarding the plaintiffs \$2,000.00 damages against the Hazard Dean Coal Co. and Bluegrass Coal Co., a verdict in favor of Combs on the issues made by the cross-petitions against him, and also a verdict in favor of the Lexington & Eastern Railway Co., the last being directed by a peremptory instruction from the court. Judgment was entered by the court in conformity to these findings. The Hazard Dean Coal Co. and Bluegrass Coal Co. were refused a new trial, and from so much of that judgment

as awarded the plaintiffs \$2,000.00 damages against them, and as refused them a recovery of these damages on their cross-petitions against D. Y. Combs, they have appealed.

The grounds urged by appellants for a reversal of the judgment are that the trial court erred: (1) in refusing to direct a verdict for the appellant Bluegrass Coal Co. and dismiss the action as to it; (2) in instructing the jury; (3) in refusing instructions asked by appellants.

It appears from the averments of the petition and the evidence found in the record, that at the time of the institution of this action, Jane McIntosh owned a small tract of land containing fifteen or twenty acres lying on Messer Branch, a tributary of the north fork of the Kentucky river and within the corporate limits of the town of Hazard, upon which she, her husband and children resided, and that the appellant, Hazard Dean Coal Co., then owned and was operating within the corporate limits of Hazard a coal mine situated on an adjoining tract of land; that for the purpose of better enabling it to ship and market the coal from its mine, the Hazard Dean Coal Co. constructed a branch railroad or spur track from the main track of the railroad, owned and operated, through Perry county, by the Lexington & Eastern Railway Co., to its coal mine, which branch railroad connects with the latter's railroad at a point about 150 feet below Messer Branch and runs up the branch to appellant's coal tipple, near the mine. As thus constructed the branch railroad crosses and occupies the land of Mrs. McIntosh in two places, bordering the street upon which the land fronts, to the width of the road bed and for a distance of perhaps 500 feet. The branch railroad has since its construction occupied the McIntosh land. It further appears that in constructing the branch railroad the appellant, Hazard Dean Coal Co., filled with dirt and destroyed a valuable and lasting spring on appellees' land; and, in addition, made on the land a fill of rock and dirt 300 feet in length and ten or twelve feet in height, which cut off from the street that part of appellees' land not occupied by the railroad track, and thereby practically destroyed all means of ingress and egress to and from the land to the street.

Appellants' contention that the trial court should have dismissed the action as to the Bluegrass Coal Co., or at any rate have directed a verdict for it, is bottomed

on the theory that the wrongful acts complained of in the petition, if committed at all, were committed by the Hazard Dean Coal Co. before the sale and conveyance by it of its coal mine, railroad and franchise to the Bluegrass Coal Co., and, therefore, the latter is not legally responsible for the damages that may thereby have been caused the appellees. This contention ignores the self-evident fact and legal principle that the Bluegrass Coal Co., by its purchase of the property rights and franchise of the Hazard Dean Coal Co. and entering upon and continuing, to the exclusion of appellees, the use of their land occupied by its railroad wrongfully appropriated by its vendor, and by such user also continuing the consequential injuries to the remainder of appellees' land, will be deemed to have adopted the original wrongful appropriation of the land and, by reason thereof, to become equally with its vendor, the original wrongdoer, liable to appellees for the damages directly resulting to them from such wrongful appropriation of their land.

Constitution, section 13, Bill of Rights, and also section 242, declare:

"Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them." In interpreting this section we have uniformly held that whether the property affected be taken, injured or destroyed, under its mandatory provisions, the owner must be compensated. It has been held to apply to the removal of dirt on its own land by a railroad company in such manner as to withdraw the natural support of the soil of adjoining land of another owner. *L. & N. R. R. Co. v. Culbertson*, 158 Ky. 561. In other cases it has been held to apply where a railroad company so constructs its track or tracks as to prevent the owner of adjoining land from reasonable ingress or egress to and from his property, or to cause necessarily soot and cinders to enter his dwelling. *Stickley v. C. & O. Ry. Co., etc.*, 93 Ky. 323.

In *Stickley v. C. & O. Ry. Co.*, *supra*, the action was instituted against both the Maysville & Big Sandy Railroad Co. and its vendee, the Chesapeake & Ohio Railway Co., to recover damages for obstructing the right of ingress and egress to and from the plaintiff's property, and also for injuries to the building caused by the smoke and cinders thrown into it by passing trains; the injuries

complained of though begun by the Big Sandy Railway Co. were continued by the Chesapeake & Ohio Railway Co. after its purchase of the railroad and franchise of the former, which was prior to the institution of the action. A demurrer was sustained to the petition in so far as it claimed damages of the last named company upon the ground that its vendor was alone responsible for the injuries complained of by the plaintiff. In rejecting this defense and holding the vendee as well as the vendor liable on the cause of action set forth by the petition, we in part said: "But here it is distinctly averred that the right of property has been invaded by both vendor, while it operated the road, and the vendee since its purchase or lease, in obstructing the right of entrance to the dwelling. It seems to us there can be no good reason assigned for relieving a vendee from all liability of injury that amounts to an invasion of another's property, where his possession is based upon no other title than a tortious entry by his vendor. The act of the vendor in appropriating the property being wrongful, that of his lessee is equally so. And while the lessee may not be liable for the mode of the original entry, he is, nevertheless, liable for appropriating this property to his own use. . . . A railroad company which enters upon and appropriates the land of another to its own use, without right, cannot transfer its corporate privileges to another so as to justify a continuance of the wrong in its vendee, as if the latter were an innocent purchaser. It is a taking in both instances without compensation being previously made to the owner. . . . *Fulton v. Shore Route Transfer Co.*, 86 Ky. 640; *L. & N. R. Co. v. Finley*, 86 Ky. 294."

In *Lewis on Eminent Domain*, section 456, it is said: "No right can be acquired in private property under the power of eminent domain, except subject to the duty of making just compensation therefor; consequently the party originally taking or occupying the property can not transfer to another by lease or otherwise, any right in the property, except subject to the same duty."

The rule announced in *Stickley v. C. & O. Ry. Co.*, etc., *supra*, is still recognized and followed in this jurisdiction. Indeed, so carefully has it been adhered to by this court, that in the very recent case of *Lexington & Eastern Ry. Co. v. Breathitt County Board of Ed.*, 176 Ky. 541, it was applied to prevent the railroad company, which undertook to construct its track across a lot over which it had

acquired no right of way, from excusing its act in so doing upon the ground that because the acts of trespass were committed by an independent contractor, the latter and not the railroad company was responsible for the resulting damages. Although judgment went against the railroad company alone for the damages claimed by the landowner, it was declared in the opinion that the independent contractor, who was not sued, might have been held equally liable for same. In view of the foregoing authorities, we think appellants' contention as to the non-liability of the appellant Bluegrass Coal Co. is without merit; and if right in this conclusion, it necessarily follows, that their complaint of the failure of the trial court to give the peremptory instruction asked, directing a verdict for the Bluegrass Coal Co., is equally without merit.

Appellants object to the instruction given by the trial court on the measure of damages. It does not seem to be claimed by their counsel that the instruction does not correctly state the measure of damages that would be applicable to a case of trespass or continued trespasses to realty, amounting to such a taking of or injury to it as would violate the provisions of the Constitution, *supra*, but they insist that this is not that character of case, and that if damages were recoverable in the case at all, they were and are only such as might be assessed and awarded in a proceeding to condemn the land for appellants' railroad under the power of eminent domain, as provided by Ky. Stats., sections 835-840, inclusive. We are unable to sustain this contention. The appellant, Hazard Dean Coal Co., before entering upon appellees' land or beginning its construction of its railroad thereon, and the appellant Bluegrass Coal Co., following its purchase of the property and franchise of that company and before taking possession of the railroad, might have instituted the necessary proceedings to condemn enough of appellees' land for a bed and right of way for the railroad and thereby secured the desired quantity of land, upon compensating appellees therefor in the amount determined in the condemnation proceedings. But having failed to take this course and followed an illegal one in obtaining the land, they can not complain that they were proceeded against by appellees as trespassers, or that they were required by the trial court and jury to respond as such, in

damages measured by the standard that must be applied for a wrongful appropriation of the land of another and such consequential damages as directly result therefrom.

It is not to be overlooked that appellants' railroad is not a common carrier, running from one commercial center to another. It is but a spur track or branch road of a few hundred yards in length, used solely by appellants, or at present by the Bluegrass Coal Co., for transporting its coal from the mine to the railroad of the Lexington & Eastern Railway Co. for shipment to various places of market. The public can ship nothing over it, and its operation, even in the absence of the evils that are shown to have resulted from its existence, can add nothing to the value of appellees' land or to their advantage.

While the instruction as to the measure of damages is in some respects awkwardly worded, it seems to set forth with substantial accuracy all the elements proper to be considered by the jury in fixing the damages as a whole, and contains nothing that should have been excluded from their consideration, or that might serve to mislead them.

In looking to the evidence we find that much of it conduced to prove that the market value of appellees' land has been greatly lessened by the construction and operation of appellants' railroad upon it; that the fill, ten feet in height, constituting in the main the bed of the railroad on appellees' land, and which borders the road or street and separates the remainder of the land from it, so greatly obstructs the way as to constitute almost a complete barrier to all means of ingress and egress to and from the land at any convenient point. In addition to this proof, there was other evidence as to the value of the land taken for and actually occupied by the railroad and also as to the destruction of appellees' spring by the dirt with which it was filled by appellants in building and maintaining the railroad. Evidence introduced for appellants tended to contradict that of appellees as to the question of damages, but this contrariety of evidence required the submission of the case to the jury. Considering the evidence respecting the conditions referred to and the extent to which they were shown to have affected and lessened the market value of the property, we are not prepared to say that the damages awarded appellees by the jury were excessive.

We do not overlook the fact that there was some evidence in behalf of appellants tending to show that Jere McIntosh, the husband of Jane McIntosh, owner of the land, had knowledge of the appropriation of the land for the railroad, and that he consented to look to D. Y. Combs for compensation for the land taken, but Jere McIntosh denied that he agreed to look to Combs for compensation, and it was also denied by Combs and other witnesses as well. Besides, the evidence fails to show any knowledge on the part of Jane McIntosh, owner of the land, of its appropriation for the railroad until after the railroad was constructed; and none whatever that she consented to such appropriation of her land, that she agreed to look to Combs for compensation or that her husband was authorized by her to consent that she would look to Combs for such compensation. Even consent on the part of the husband to the taking of the land for the railroad would not have been binding on the wife.

It is earnestly insisted for appellants that the trial court erred in not directing a verdict in their favor against D. Y. Combs. This contention is based on the following clause found in the written lease from Combs and wife to Jones and other lessors of the Hazard Dean Coal Co., whereby the latter acquired the Hazard Mine, which other property and franchise lease it in turn assigned to the Bluegrass Coal Co.

“Further the lessors (D. Y. Combs and wife) covenant, agree and bind themselves to furnish to the lessee a right of way for a railroad track, as located by the lessee’s civil engineers, up to a point on Messer branch, wherever they may locate their tail tracks and tipples.”

It is alleged in appellants’ cross-petitions against Combs, and certain evidence introduced by them conducted to prove, that he did furnish to the Hazard Dean Coal Co., as located by its engineers, the right of way for its railroad, which included the land taken from Jane McIntosh. On this point the great weight of the evidence seems to be that Combs furnished the entire right of way for the railroad as located by appellants’ engineers, but that when appellees’ land was reached, instead of locating the right of way upon any part of it, it was by his direction located by the engineer on adjoining land of Johnson and Johnson, which Combs had obtained for the purpose; but that thereafter appellants’ engineer, without his knowledge or consent and without that of Jane

McIntosh, changed the location of the right of way for the railroad across Messer branch to her land and later constructed the railroad on her land at that point. This issue of fact thus arising between appellant and Combs was submitted to the jury under proper instructions and the jury returned a verdict for Combs. As the verdict is sustained by the evidence no reason is apparent for disturbing it.

In this connection appellants' complaint of the court's refusal of an instruction asked by them on the issue between them and Combs, will be noticed. The instruction if given would have been mere surplusage, as what it contained was in substance embraced in instruction No. 3, which was given to the jury. This instruction, after setting forth the clause in the lease whereby Combs undertook to furnish the right of way for the railroad track, advised the jury as follows:

"And if you shall further believe from the evidence that said right of way included the strips of land taken of the plaintiff (Jane McIntosh); and if you shall believe from the evidence that a portion of the plaintiffs' land was so taken by the fill and railroad mentioned by them in their evidence, then you will find for the defendants, Hazard Dean Coal Co. and the Bluegrass Coal Co., assignee of the Hazard Dean Coal Co., in the same amount as you found for plaintiffs against the Hazard Dean Coal Co. Unless you so believe, you will find for D. Y. Combs against the Hazard Dean Coal Co."

This instruction stated the law on the issue triable as to Combs as clearly as the one offered by appellants would have done if given; hence, the refusal by the court of the one asked was not error.

Our examination of the record fails to convince us of any material error in the admission or rejection of evidence. As in the trial of all such cases, some incompetent evidence crept in; but nothing of an incompetent character was admitted that can be said to have prejudiced any substantial right of the appellants.

We have not discussed the issues made by the pleadings affecting the Lexington & Eastern Railway Co., as the verdict returned in its behalf by the jury is not complained of and no appeal or cross-appeal has been taken from the judgment dismissing the action as to it.

The record furnishes no legal cause for disturbing the verdict returned, therefore the judgment is affirmed.

Speckman v. Schuster.

(Decided February 18, 1919.)

Appeal from Campbell Circuit Court.

1. **Landlord and Tenant—Liability for Tenant's Injury.**—The landlord is not liable for injuries growing out of the defective condition of the premises, unless such condition is known to the landlord and is not known to, or discoverable by, the tenant on a reasonable inspection, and the landlord conceals, or fails to disclose, such condition to the tenant.
2. **Landlord and Tenant—Liability for Tenant's Injury.**—Where the defective condition of an attic floor was known to, or discoverable by, the tenant on a reasonable inspection, the tenant could not recover for injuries caused thereby, even though she did not know of the existence of a stairway underneath the flooring, and fell further than she had reason to anticipate she would fall if the flooring gave way, since the liability of the landlord turns on the fraudulent concealment of a latent defect and not on the tenant's full appreciation of the danger.

GEORGE VEITH and NELSON & GALLAGHER for appellant.

ARTHUR C. HALL for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

Kate Schuster, a tenant of Charles W. Speckman, brought this suit against him to recover damages for personal injuries. From a verdict and judgment in her favor for \$2,128.00, defendant appealed. Thereafter, his death was suggested, and the case was revived in the name of his administratrix.

Defendant is the owner of a two-story brick building on Monmouth street, in the city of Newport. At the time of the accident, the first floor was used as a store-room by defendant. On the second floor were two flats, one in the front of the building, and the other in the rear, each consisting of three rooms. One flat was occupied by Mr. and Mrs. Almoschlectner, while the rear flat was occupied by plaintiff. Above the second floor was an attic. According to plaintiff's evidence, she rented not only the flat but also the attic for the purpose of hanging out her wash. On December 5, 1916, and after she had been a tenant for about six months, she was engaged in hanging clothes in the attic. She stepped upon the covering of an abandoned stairway, and two or three of the boards

gave way, precipitating her to the stairs below. Besides being badly bruised and wrenched, she sustained a fracture of the coccyx vertebra. After describing how she fell and the extent of her injuries, plaintiff testified as follows: "Q. Now, what was that you fell in? What kind of a place was it? A. It was an old stairway which some time, I suppose, had been covered over. Q. Where was it? A. In the attic, and I knew nothing about it because you couldn't tell on the floor it was one place like another, all different sorts of boards and loose and you couldn't tell this was covered over, this stairway. Q. Did you know anything about that stairway before you fell through? A. No, sir, I did not. Q. What part of the attic was that stairway in? A. In the front part. Q. And were there any lights there to light it up? A. Only one window and it was very dark at that place. Q. Was the light sufficient for you to see it? A. No, sir. Q. Now, how long had you been using that attic before the 5th day of December? From the time that you moved in there? A. Yes, sir. Q. In going about the attic how did you go? What care did you use? A. Just as I said; used it for laundry work and had things stored up there. Q. I will ask you if in going about the attic doing the work you did do and giving it the attention that was necessary to give it, and also necessary to give in walking about the attic and going around there, could you have seen or could you have discovered that stairway? A. No, sir, I couldn't. Q. Why couldn't you? A. Because the boards were all over and about the same looseness and two or three laying on top of each other and you couldn't tell there was any more of a stairway there than any place else. Q. About how many times had you used the attic before the time you fell through, if you know? A. I used it during the winter every week, two days, and of course in summer time I would use the yard. Q. Had you ever stepped on this stairway before? A. I don't just remember of stepping on that board, but I suppose I did. Q. You say you suppose you did? Have you any distinct recollection of whether you did or not? A. I couldn't say just if I really stepped on that board, because I hardly think I did, but I guess I have; I never went through before. Q. About how many boards gave way with you when you fell? A. I suppose about three of them, about three of them; about three fell in as I fell down in there. Q. Did you see the stairway, the hole that

you fell through afterwards? A. Afterwards, yes, sir; after I came to. Q. What was the condition of the boards then that covered it? A. They were rotten. Q. What part of them was rotten? A. Where the nails were drove in. Q. Was there anything on the sides for the boards to rest on? A. I couldn't tell you, I was hurt too bad; I couldn't say that."

Again, on cross-examination, plaintiff testified as follows:

"Q. You say the boards in that attic floor were all loose; loose all over? A. Yes, sir. Q. They were loose all over? A. Yes, sir. Q. And when you would go over them you were aware of that fact? A. Yes, sir. Q. How large was that attic? Tell the jury. A. The attic was over three rooms; I really couldn't say how large the three rooms were; the three rooms that Mrs. Almoschlectner lived in; the attic was all over that part. Q. All over Mrs. Almoschlectner's rooms? A. Yes, sir. Q. Were those boards very loose all over that place? A. I didn't just examine that particularly, but they would sag when you would walk over them. Q. They would? A. Yes, sir."

As to the condition of the attic floor, Mrs. Almoschlectner testified as follows: "Q. What condition was the attic in; that is, the floor? A. Very bad condition. Q. In what way? A. The boards were loose, most all of them, and when you would walk on them they would go up and down. . . . Q. I will ask you if you ever stepped on the covering over the stairway in the attic? A. Yes, sir, often. Q. What would happen when you would step on them? A. The boards would go down, especially on one end. Of course, we would always try to avoid it. . . . Q. Could you see that (the loose condition of the boards over the stairway) if you stepped on it? A. You could not see it, but you could feel them as they went down."

Mrs. Almoschlectner's husband described the condition of the attic floor as follows:

"That attic floor was dangerous; all over the boards would go up and down in different places."

Mrs. Weber, another tenant, gave the following testimony: "The attic floor was in a pretty bad condition when I went up there. . . . Q. I will ask you if you ever saw any stairway opening up there in the attic? A. I noticed that the boards were awful loose and when I

hung my clothes up there, when I stepped on them they were loose and I was afraid I would go through and I jumped off of them."

The testimony of Harry Kirchoff was as follows: "Q. How was the floor in the attic? A. The floor was loose boards of all different thicknesses."

Edith Schuster, plaintiff's daughter, testified as follows: "Q. Did you ever have occasion to observe the condition of the floor of the attic? A. Yes, sir, the floor was in very bad condition. Q. Did you know anything about a stairway that was covered up? A. No, sir, you couldn't tell it. . . . Q. Was there anything around the attic there to indicate that there was a stairway covered over, that you could see? A. Yes, sir, but I never saw it up there. I saw it from the front of the apartment where Mrs. Almoschlectner lived, but I never gave it any attention because I never visited Mrs. Almoschlectner very much."

There was further evidence to the effect that defendant was aware of the defective condition of the floor.

The only question we deem it necessary to consider is whether the defendant's motion for a peremptory instruction should have been sustained.

It is the settled law in this state that there is no implied warranty on the part of the landlord that the premises are fit for the purposes for which they are rented, or that they are in any particular condition. On the contrary, the rule of *caveat emptor* applies. The tenant takes the premises as he finds them, and the landlord is not liable for injuries growing out of the defective condition of the premises, unless such condition is known to the landlord and is not known to, or discoverable by, the tenant on a reasonable inspection, and the landlord conceals, or fails to disclose, such condition to the tenant. The reason for the rule is that the liability of the landlord in such cases rests entirely upon the notion of deceit; that is, knowledge on the part of the landlord of the defective condition, and fraudulent concealment from the tenant. Manifestly, if the tenant knows of the defective condition, or could discover it by reasonable inspection, the element of deceit is lacking, and there can be no recovery. *Thomasson, et al. v. Hiatt*, 174 Ky. 293, 192 S. W. 19; *Holzauer v. Sheeny*, 127 Ky. 28, 104 S. W. 1034; *Andonique v. Carmen*, 151 Ky. 249, 151 S. W. 921. Applying this rule to the facts of this case, we find that

plaintiff had been regularly using the attic for several months. Plaintiff says that the boards were loose all over the floor, and would sag when she would walk over them. Indeed, all the witnesses agree that the attic floor was in very bad condition; that the boards were loose, and when one would walk over them, they would go up and down. No particular inspection was necessary in order to discover this condition. Plaintiff admits that she knew of it. It was apparent not only to her but to everyone who used the attic. The only thing that plaintiff claims not to have known was the existence of the stairway. This fact is not material. It bore solely on the extent of the danger. The liability of the landlord does not turn on the tenant's full appreciation of the danger. The controlling element is the fraudulent concealment of a latent defect. Where, as here, the defect is known or is discoverable by a reasonable inspection, the element of deceit is lacking, and the landlord is not liable, even though the defective condition of the floor caused plaintiff to fall further than she had reason to anticipate she would fall if the floor gave way. The trial court should have instructed the jury to find for the defendant.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

**Stoecker, Schreick, Kaelin, Schuler, Doerhoefer and
Stoke v. Goodman, et al.**

KAISER V. GOODMAN, ET AL.

JOCHIM V. GOODMAN, ET AL.

MILLER V. GOODMAN, ET AL.

SEBOLT V. GOODMAN, ET AL.

LANG V. GOODMAN, ET AL.

RUBY V. GOODMAN, ET AL.

EHELL V. GOODMAN, ET AL.

(Decided February 21, 1919.)

Appeals from Jefferson Circuit Court
(Chancery Branch, Second Division).

1. Corporations—Subscriptions to Stock—Liability for Unpaid Subscriptions—Bona Fide Purchasers.—A corporation issued a cer-

tificate of common stock to an agent with the agreement that the common stock should be given as a bonus to purchasers of preferred stock, who were informed that they would receive one share of common stock with each two shares of preferred. No stock was assigned to the purchasers by the agent, but the stock was issued and accepted by them directly from the company. Held, that such purchasers were not bona fide transferees for value, but were liable to the creditors of the corporation for the par value of the common stock.

2. Corporations—Subscriptions to Stock—Bonus Common Stock With Subscription to Preferred Stock.—Where persons subscribed for preferred stock at a par value of \$25.00 per share, at the price of \$35.00 per share, with the understanding that they would receive one share of common stock with each two shares of preferred, the additional \$10.00 was paid solely as a premium on each share of preferred, and was in no sense a payment on the common stock, and the purchasers were not entitled to have their indebtedness for the common stock credited by the premium paid on the preferred stock.
3. Corporations—Subscriptions to Stock—Liability of Stockholders to Creditors.—Under Constitution, section 193, and Kentucky Statutes, section 547, the liability of stockholders to creditors of a corporation for unpaid stock subscriptions is absolute, and is not affected by the creditors' knowledge, or want of knowledge, when the credit was extended, that the stock was issued with the understanding that it was not to be paid for.
4. Bankruptcy—Corporations—Unpaid Stock Subscriptions—Right of Action—Trustee's Sale.—A corporation permitted its agents to sell its preferred stock with the understanding that the purchasers would receive one share of common stock as a bonus with each two shares of preferred, and that the common stock was fully paid and non-assessable. The corporation became bankrupt and the trustee sold its real estate "together with all the personal property, open accounts, notes and all assets belonging to the said Globe Casket Company, and now in the hands of the party of the first part, as aforesaid trustee." Held, unnecessary to determine whether the trustee's right of action for unpaid stock subscriptions could have been sold, but sufficient to say that it was not sold and did not pass to the purchaser at the trustee's sale, in view of the fact that the corporation was estopped to recover the unpaid stock subscription, and the liability of the stockholders was in no sense an asset of the corporation, nor was it ever in the hands of the trustee.

J. W. S. CLEMENTS & KEITH L. BULLITT for appellants, except L. Stoke.

BOLDRICK & GOCKE and FRANKLIN CHAPPELL for appellant, L. Stoke.

BURNETT, BATSON & CARY for appellees, except D. C. Smith.
STRAUS, LEE & KREIGER for appellee, D. C. Smith.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming as to Charles W. Stoecker, Jacob Schreick, Martin Kaelin, Xavier Schuler, Louis Doerhoefer and Frank W. Kaiser, denying the appeal of, and affirming as to, Lorenz Jochim, C. A. Miller, Max J. Sebolt, Edward M. Lang, J. E. Ruby and George Ehell, and reversing as to Louis Stoke.

These appeals grow out of the same facts, are prosecuted on the same record and will be considered in one opinion.

The suits were brought by appellees, creditors of the Globe Casket Company, to recover of the appellants, except Frank W. Kaiser, the par value of common stock of that company, alleged to have been received as a bonus in connection with the purchase of the company's preferred stock. Appellants, Stoecker, Schreick, Kaelin, Schuler, Doerhoefer and Stoke were held liable, and individual judgments were rendered against them for amounts exceeding \$500.00. The judgments rendered against Jochim, Miller, Sebolt, Lang, Ruby and Ehell were for less than \$500.00, and each of them prays for an appeal. The appeal by Frank W. Kaiser is from an order of the court, refusing to permit him to file an intervening petition, asserting title to the liability of the appellants.

The facts are as follows: The Globe Casket Company is a Kentucky corporation, and was incorporated on May 11, 1911. It continued in business until July 21, 1914, when an involuntary petition in bankruptcy was filed against it. On August 6, 1914, it was adjudged a bankrupt. Its assets were insufficient to pay preferred claims, and the unsecured creditors received nothing.

Steps looking to the incorporation of the company were begun in April, 1911, by three promoters, R. H. Hundley, J. A. Schuessler and S. Oppenheimer. The promoters and their attorney entered into a preliminary agreement, providing for the organization of the corporation with a capital stock of \$100,000.00, \$50,000.00 of which was to be preferred stock and \$50,000.00 common stock. The par value of each kind of stock was \$25.00. It was further provided by the agreement that Hundley would undertake to sell the preferred stock and pay all necessary expenses, and in consideration of his services and to reimburse him for his expenses, the company

would issue to him the entire common stock fully paid. It was further provided that Hundley might, if he desired, sell the preferred stock at a premium and retain for himself all the amounts paid in excess of par, and might also give away so much of his common stock as he might deem necessary to assist him in disposing of the preferred stock. Thereafter, the company was incorporated, and the promoters constituted the first board of directors. Thereupon, the contract between Hundley and the incorporators for the sale of the preferred stock was approved and adopted by the board of directors. The minutes of the meeting also show that it was agreed that the preferred stock should be sold at \$35.00 per share, and that this price could be changed only by agreement between the board and Hundley; that the president was directed to issue to Hundley a certificate for two thousand shares of the common stock, fully paid up, the same to be delivered as the preferred stock should be sold, and that it was further agreed that Hundley, out of the common stock, should transfer to each purchaser of preferred stock one share of common for each two shares of preferred sold. Pursuant to this agreement, a certificate for two thousand shares of common stock was issued to Hundley, but the certificate was never detached from the stock book and remained in the possession of the company. As the preferred stock was sold, the common stock, to which each purchaser was entitled, was issued by the company, and a notation made on Hundley's certificate, showing the name of the purchaser and the number of shares of common stock issued to him. The sales of stock were made principally by Hundley, Oppenheimer and C. L. Otto. The subscriptions were taken on blanks, reading as follows:

“Capital \$100,000
No. Globe Casket Company
Incorporated
Preston and Burnett Avenue

.....191.....

“I hereby subscribe for shares of eight per cent preferred stock of the Globe Casket Company, of Louisville, Kentucky; for which I agree to pay thirty-five (\$35.00) dollars per share, fully paid and non-assessable.

"Solicitor _____ Signature _____

"Make all settlements payable to Globe Casket Co. Address _____"

"Capital \$100,000

Par Value \$25 per share

No. _____ Globe Casket Company. Amount \$ _____

Incorporated

Preston and Burnett Avenue

_____ 191 _____

Received of _____

_____ Dollars

In full payment of _____ shares 8 per cent preferred capital stock of Globe Casket Co. (You are also to receive one share of common stock with each two shares of preferred.) Make all settlements payable to Globe Casket Company.

Solicitor."

In describing the method employed in making sales, Hundley testified as follows: "6. What did you state to purchasers when you were selling the stock, if anything? A. If I would go to see a man to sell him some stock, I would tell him I was, of course, representing the Globe Casket Company, which I was, and the par value of the stock was \$25.00 per share, but we sold it at \$35.00 a share, but in addition to the preferred stock we would give him one share of common stock with each two shares of preferred. In some cases where some of the prospective buyers would bring up about the common, about whether it was fully paid, I would say, 'It is fully paid and non-assessable, according to my contract.' 10. Why did you say it was paid up and non-assessable, the common stock? A. Because the contract provided that way. 11. How did you pay for it, in what way? A. I was to get that for the services, the common stock, and the money made out of it, I wanted to make some money, of course, in selling this stock I made \$20.00 on every two shares of preferred I sold, \$10.00 a share commissions, you see. 12. But in order to induce them to do that, as I understand, you told them you would give them one share of common stock for each two shares of preferred? A. That is right, yes. Q. Was there any application or subscription by any purchaser of any other sort of stock except preferred stock? A. No. Q. Did any

purchaser of stock in that company, any of these defendants, buy anything from the company except preferred stock? A. That is all they bought. Q. Did you tell anybody how you came into possession of the \$50,000.00 of common stock? A. No, it was none of their business how I got it. Q. How did you explain the increase in the sale price over the par value of that preferred stock? A. . . . I would say to him this common stock is fully paid and non-assessable; there is nobody got any authority to give this stock away but myself; I have a contract with the company. Of course, if that never came out I never mentioned it only when a man would bring the question up himself, and the stock was mine; it was all mine, and the contract was made even before the company was incorporated. The agreement was made, and then after the company was incorporated if I ain't badly mistaken it was signed by the Globe Casket Co. adopting the contract made before the company was incorporated. There is not a man on earth that has got a share of that common stock is liable for it in my opinion."

Oppenheimer's testimony is as follows: "57. What was the method as to the issuance of common stock, where preferred had been sold? A. At the time the company was organized, at the direction of the president of the company, the whole common stock, consisting of \$50,000.00, was issued to R. H. Hundley, in accordance with the contract entered into between him and the company and in addition passed by the board of directors. Thereafter, whenever preferred stock was sold, I made a memorandum on the back of this certificate of stock which stood in the name of R. H. Hundley, showing the number of the certificate for common stock and the number of shares which were issued as a bonus to the purchaser of the preferred stock. 58. Was this \$50,000.00 worth of common stock transferred to Hundley at the organization of your company as compensation to him for selling the preferred stock? A. Only to the extent of \$25,000.00. The other \$25,000.00 was done for the purpose of evading the law, and to make it plain, at that time none of us had the least conception that there ever could be a possibility that the company should become bankrupt, because we all thought that there was plenty of room for a new company, and we did not dream that there would be any trouble about the common stock. 59. When you took

over Hundley's contract and the balance of the common stock in Hundley's name was transferred to you, state whether or not all of that common stock was to be compensation to you for selling the preferred stock? A. Only to the extent of one-half. 60. What was the other half, that was in your name and Hundley's name at the time he held the contract, to be used for? A. As a bonus, in accordance with the resolution entered on the minutes of the company and Hundley's contract. I wish to say, further, that the resolution as entered on the minutes of the board of directors of the Globe Casket Company goes further than this contract, because on the minutes of the company it is stated expressly that Hundley must give with every two shares of preferred stock one share of common as a bonus, or it says that with every one share of preferred stock he must give one-half of a share of common stock as a bonus; and, if my recollection is right, the contract does not go so far, but states only that this \$50,000.00 of common stock shall be used for promotion purposes. . . . I then stated the plan of organization; that the capital stock was \$100,000.00, divided into \$50,000.00 preferred and \$50,000.00 common stock, the par value of each being \$25.00 per share; that the preferred was sold at a premium of \$10.00, to-wit, \$35.00 per share, and that the purchaser of the preferred stock would receive, as a bonus, a half share of common stock with each share of preferred. I might have used, in some cases, the expression, 'one share of common with each two shares of preferred,' or where a man bought 20 shares, I told him, he would receive, with 20 shares of preferred, 10 shares of common, as a bonus; but always on that basis I explained the proposition. After I had convinced my prospect that the proposition was all right and he agreed to become a stockholder I wrote the application, and the purchaser of the stock signed his name and address. I wrote his receipt at the same time I wrote his application, and gave him the receipt—a similar one, like that attached to the application."

Upon the same question Otto testified as follows: "49. Taking these individuals you sold to, tell the court the basis on which they purchased this preferred stock? A. In the manner that it was presented to them? 50. Yes, sir. A. We went to see them and we told them that the company was capitalized for \$100,000.00, \$50,000.00

of it was preferred and \$50,000.00 of it was common; the preferred stock was an eight per cent cumulative dividend, paid annually, and the par value of it was \$25.00 a share, but we were selling it at \$35.00 a share, and with each share of preferred stock we gave half a share of common."

Only two of the appellants, Stoecker and Stoke, testified in their own behalf. Stoke says that he paid \$35.00 a share for the preferred stock, and for every two shares of preferred stock he received one share of common stock for nothing. Stoecker says that Hundley and Otto came to his office and told him they had a good thing, and that it was the Globe Casket Company; that they had common stock which had voting power, but the preferred stock did not; that the preferred would pay eight per cent, and that for every share of preferred he bought at \$35.00 they would give him one-half share of common. They further told him that the common stock was Hundley's, and that it was full paid and non-assessable. Shortly thereafter he bought 34 shares of preferred and 17 shares of common, at \$30.00 a share. At that time he made no inquiries of the company if the common stock had been paid for. Hundley gave him a receipt for the stock and subsequently he received the stock, either through mail or through Mr. Otto.

Section 193 of our Constitution and section 568, Kentucky Statutes, provide that no corporation shall issue stock or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time said labor was done or property delivered; and all fictitious increases of stock shall be void. Section 547, Kentucky Statutes, provides that the stockholders of each corporation shall be liable to creditors for the full amount of the unpaid part of stock subscribed for by them. For appellants, however, it is suggested that they were *bona fide* purchasers and are not, therefore, liable. The facts, however, do not bring the case within the rule announced in *Hess v. Trumbo*, 84 S. W. 1153. The contract, as ratified by the board of directors, provided that Hundley should transfer to each purchaser of the preferred stock one share of common stock for each two shares of preferred. In other words, the purpose of

transferring the common stock to Hundley was to enable him to give it away to purchasers of the preferred stock. Manifestly, this scheme was a fraud on the creditors of the corporation. Appellants subscribed for the preferred stock with the understanding that they were to receive one share of common stock for each two shares of preferred stock. They did not purchase the common stock in the open market. They paid nothing for it. They did not deal with Hundley and his assistants as mere stockholders, but dealt with them as agents of the company. No certificates of common stock were assigned to them by Hundley. On the contrary, they received and accepted the common stock directly from the company, knowing that they had paid nothing for it, and that it had been issued to them as a mere bonus pursuant to the subscription contract. Under these circumstances, they were not *bona fide* transferees for value. *Gillett v. Chicago Title & Trust Company*, 230 Ill. 373, 82 N. E. 891. Though it be true that they incurred no liability to the corporation because of its conduct in permitting its agents to represent the common stock as fully paid, yet they incurred a liability to the creditors of the corporation.

But it is insisted that the chancellor erred in not giving appellants credit for the premium which they paid on the preferred stock.

The argument is as follows: The par value of the preferred stock was only \$25.00. They paid a premium of \$10.00 per share. The premium was in effect a payment on the common stock. That being true, it follows that each subscriber for two shares of preferred actually paid 80% of the par value of each share of common stock received therewith. The difficulty with this contention is that it does not square with the facts. The uncontradicted evidence shows that appellants subscribed for the preferred stock at the price of \$35.00 per share, and that the common stock was given to them. It follows that the additional \$10.00 was paid solely as a premium on each share of preferred, and was in no sense a payment on the common stock. Under these circumstances, their indebtedness for the common stock, which was given to them as a bonus, cannot be credited by the premium which they paid on the preferred stock.

On the appeal of Louis Stoke the following facts appear: Stoke purchased several shares of preferred stock

and received as a bonus a number of shares of common stock. About a year later, he became a director of the company, and continued to act as such until its dissolution. During this time, he became surety for the company on certain notes aggregating several thousand dollars, which he was compelled to pay. He insisted below that he was entitled to share with the other creditors in the amount recovered from appellants, but was denied this right on the ground that he acted with full knowledge of the circumstances under which the common stock was issued. It is true that in the case of *Miller v. Higginbotham's Admr.*, 29 Ky. Law Rep. 549, 93 S. W. 655, we recognized and applied the rule that, where one extends credit to a corporation with actual knowledge of the fact that its shares of stock are to be regarded as paid up and non-assessable, he cannot exact from the shareholders the amount of their unpaid subscriptions. That case, however, arose prior to our present Constitution and statutes regulating the subject. It is clear from their provisions that the legislature intended to make stockholders absolutely liable to creditors for their unpaid stock subscriptions, without regard to the creditors' knowledge, or want of knowledge, of the fact that the stock was not paid for when the credit was extended. Thus, in *Williams v. Chamberlain*, 123 Ky. 150, 94 S. W. 29, a case which arose under an Arizona statute similar to ours, we said: "It is not material whether creditors of the corporation know the amount of the stock actually subscribed, or the amount actually paid on stock subscribed by shareholders. They have a right to deal with the corporation in good faith, and to assume that shareholders who have subscribed for stock have either paid, or will pay, the amount of their subscription; and in the absence of any agreement or understanding between the creditors and the corporation, or shareholders, as to the amount of the liability of the latter, the question as to the creditors' knowledge, or lack of knowledge, of the amount the stockholder has paid, or subscribed to pay, is not material." Other courts have applied the same rule to cases arising under statutes similar to ours. *Sprague v. National Bank of America*, 172 Ill. 149, 64 A. S. R. 17, 50 N. E. 19, 42 L. R. A. 606; *Moore v. United States Barrel Co.*, 238 Ill. 544, 87 N. E. 536, 128 A. S. R. 153; *Eastern National Bank v. American Brick & Tile Company*, 70 N. J. Eq. 732, 64 Atlantic 917, 10 Ann. Cases,

84, 8 L. R. A. (N. S.) 271. We therefore conclude that the chancellor erred in holding that Stoke, as a creditor, was not entitled to share in the recovery against appellants, because he extended credit to the company with full knowledge of the conditions under which the common stock was issued.

Appellant, Frank W. Kaiser, insists that the chancellor erred in refusing to permit him to file an intervening petition, asserting title to the amounts recovered by appellees. The basis of his claim is that he was a remote purchaser from the purchaser at the trustee's sale of the assets of the Globe Casket Company, and that as such purchaser he succeeded to the right of action vested in the trustee, and was entitled to the amounts recovered from the delinquent stockholders. The argument is that unpaid stock subscriptions are assets that pass to the trustee in bankruptcy, and may be sold by him as any other assets of the estate. Louis Stoke, through whom Kaiser claims by subsequent deeds and bills of sale, was the original purchaser at the trustee's sale. Under the deed and bill of sale executed by the trustee, Stoke acquired title to certain real estate therein described, "together with all the personal property, open accounts, notes and all assets belonging to the said Globe Casket Company, and now in the hands of the party of the first part, as aforesaid trustee." It will thus be seen that the personal property, transferred by the instrument in question, was limited to such as then belonged to the Globe Casket Company, and was then in the hands of the trustee. The common stock was permitted to be issued by the company's agents upon the representation that it was fully paid and non-assessable. Under these circumstances, the company was estopped to recover the unpaid stock subscriptions. That being true, the liability of appellants was in no sense an asset of the Globe Casket Company, nor was it ever in the hands of the trustee. Hence, it is unnecessary to decide whether the trustee's right of action could have been sold, but sufficient to say that it was not sold, and did not pass to the purchaser at the trustee's sale.

It follows that the chancellor did not err in rejecting the intervening petition.

On the appeals of Charles W. Stoecker, Jacob Schreick, Martin Kaelin, Xavier Schuler, Louis Doerhoefer and Frank W. Kaiser, the judgments are affirmed.

The appeals of C. A. Miller, Max J. Sebolt, Edward M. Lang, J. E. Ruby and George Ehell are denied, and the judgments affirmed. On the appeal of Louis Stoke the judgment is reversed, with directions to enter judgment in conformity with this opinion.

Pool v. Pool, et al.

(Decided February 21, 1919.)

Appeal from Caldwell Circuit Court.

Appeal and Error—Final Judgment.—A judgment ordering a sale of real estate for division held not a final judgment from which an appeal could be prosecuted by one who claimed a lien upon the property but who did not oppose the sale, and sought only to subject the proceeds to his asserted lien.

MILLER & MORSE for appellant.

J. E. BAKER for appellees.

RESPONSE BY JUDGE CLARKE—Overruling motion for rehearing and extending former opinion.

This is an appeal as stated in the opinion rendered November 26, 1918, and reported in 182 Ky. 241, from an order refusing appellant's motion to file an answer, counterclaim and cross-petition, and it is also an appeal from a judgment ordering the sale for partition of a tract of land against which appellants in their rejected pleading sought to enforce several alleged liens, and it was so considered, as is apparent since we held that appellant could not appeal until a distribution of the proceeds of the sale of the land was ordered, although we did not specially refer to the judgment and order of sale.

It is conceded by counsel in a petition for a rehearing that the order refusing the offered pleading was an interlocutory order as we held, but it is insisted most earnestly, the judgment which adjudged that F. P. Pool, J. H. Pool and Charles Pool (or his heirs if he was dead) each owned an undivided one-fourth interest in the land; that it was indivisible; "that it will be necessary to sell the whole of said tract of land for the purpose of a division of the proceeds among the heirs interested therein, and

that same be sold by the master commissioner for the purpose of a division," was a final judgment, justifying and necessitating the appeal.

In support of this contention our statement in the opinion dismissing the appeal that appellant simply sought reimbursement out of the proceeds of the sale, is most vigorously assailed, but we still think our statement was accurate, since the rejected pleading in no statement denies the indivisibility or opposes the sale of the land, although it does of course, by asserting a lien thereon, oppose a distribution among the heirs of the proceeds, until the asserted liens are satisfied, and the prayer of the rejected pleading is as follows;

"Wherefore, defendant prays that all the liens set up herein, be herein declared, established and enforced, and that his claim herein amounting to \$1,500.00, be allowed against the proceeds of the sale of this land and against all three of his brothers named herein, and that the portion of Charles Pool be adjudged subject to his share of the liability herein set forth, and that defendant be given judgment accordingly, and he prays for his costs and all other proper, general and equitable relief."

It therefore still seems to us that the judgment ordering a sale of the land for partition did not deny to appellant any relief he sought by his rejected pleading. The proceeds of the sale which appellant sought to subject to his asserted claim was still under the absolute control of the court, and the judgment ordering a sale, although it recited the sale was necessary to effect a division among the heirs, did not preclude the court from allowing any claim theretofore or thereafter asserted against same before or when a distribution should be ordered. The appellant did not even suggest that the land was indivisible or that it ought not to be sold, nor did the court in its judgment finally decide any question adversely to appellant, even if the statement in the judgment, that it was necessary to sell the land for division among the heirs, be considered an expression of the court's then opinion that only the heirs were entitled to participate in such division, because the court can and may change its opinion as to what parties are entitled to the fund, at any time before final distribution.

The purchaser of the land under the judgment of the court will of course be protected against any claim of appellant because appellant did not, as we have said and

the record conclusively proves, oppose the sale, but no one by reason of that sale can get in a position where he could interfere with or preclude appellant's assertion of his claim against the proceeds of the sale, until some order has been entered in this action disposing of same.

Section 950 of the Statutes, which allows an appeal from any judgment in which the title to land or the right to enforce a statutory lien therein is involved, does not help appellant's contention, because the judgment referred to therein is a final judgment and this is not a final judgment with reference to appellant's right to enforce a lien upon the land, because he only seeks to enforce the lien upon the land by subjecting the proceeds thereof, as to which there has been no final order.

He did not ask or suggest or want a sale subject to his asserted lien, nor oppose its sale free of any claim of his against the land, but sought only to subject the proceeds of the sale to an asserted lien against the land. This he may do so long as the fund he sought to subject remains undisposed of, and until it is disposed of finally, there is no judgment from which he can appeal.

We do not, of course, mean he must again offer to file his rejected pleading if he does not think it worth while, but only that he must await a final judgment before he can appeal.

Wherefore the petition for a rehearing is overruled.

Lexington & Eastern Railway Company v. Williams and Wife.

(Decided February 21, 1919.)

Appeal from Letcher Circuit Court.

1. **Specific Performance—Nature and Grounds of Remedy in General.**
—The remedy of specific performance is not one which will be granted as a matter of right, but will be granted or withheld by the court in the exercise of a sound judicial discretion, which, however, is not an arbitrary or capricious one, but is one to be exercised according to the principles of equity, and when to enforce it would operate harshly and oppressively upon the defendant and in a way not reasonably contemplated when the contract was entered into, the relief will be withheld and the complaining party relegated to his remedy at law.

2. **Specific Performance—When Will be Denied.**—Although such harsh, oppressive and unconscious results would follow a specific execution but not to the extent to authorize its denial under above rule if the contract, strictly construed, does not include or provide for the specific relief sought, it will be denied.
3. **Specific Performance—When Will be Denied.**—A contract provided for the sale of a right of way through vendee's farm, through which ran a natural stream, and in which, running longitudinally, the railroad company selected its right of way. The contract provided for a price for "hill" land and another for "bottom" land. Held, that neither descriptive term applied to the bed of the stream, and the specific performance sought to compel the execution of a deed to that portion of the vendee's farm in the bed of the stream will be denied.

MORGAN & HOWE, LOUIS A. NUCKOLS, D. I. DAY, BENJAMIN D. WARFIELD for appellant.

DAVID HAYS, E. E. HOGG and W. G. DEARING for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The appellees and defendants below, Hiram Williams and wife, are the joint owners of a small farm in Letcher county, Kentucky, through which runs the North Fork of the Kentucky river. On August 31, 1910, the husband entered into a written contract agreeing to convey to the appellant and plaintiff below a right of way through the farm should the railroad company conclude to use it in the extension of its road east from Jackson, Kentucky. The agreed consideration was ten dollars per acre for all hill land taken, and fifty dollars per acre for all bottom land taken, five dollars being paid at the time, and the company had until December 31 following the date of the contract in which to select the right of way and to demand a conveyance thereof. The consideration agreed to be paid was not only for the land to be taken, but also "to be in lieu of all claims for damages." It was further stipulated that if the site of defendant's dwelling should be selected as a part of the right of way, they should receive an additional sum of \$2,100.00. In describing the farm it is stated in the contract that it is "situated in Letcher county, Kentucky, on both sides of the North Fork of the Kentucky river." Mrs. Williams declined to sign or acknowledge the contract and at once repudiated it. Before December 31, following the execution of the contract, a survey was made and a description of the

right of way prepared, which, according to plaintiff, contained 1.37 of an acre. Demand was made of defendant, Hiram Williams, for the execution of a deed for the right of way as located, accompanied by a tender of the balance of the money due, estimated at the sum agreed to be paid for hill land, which balance was nine dollars. Defendants declined to accept the tender and refused to execute the deed. Soon thereafter the company began the construction of its contemplated road bed upon the land selected by it through defendant's farm, when the husband threatened to run the workmen off of his premises. Thereupon this suit was filed, seeking an injunction against defendant, Hiram Williams, to prevent him from interfering with the construction of the road, and also seeking a specific performance of the contract. The clerk issued a temporary restraining order as prayed for, which continued for a month and twelve days, and upon defendant's motion it was dissolved by the circuit judge. In the meantime, plaintiff's workmen had been busy constructing the road, which they continued to do after the dissolution of the restraining order. The case was prepared upon that branch which sought a specific performance, and upon final submission the petition was dismissed, and to reverse that judgment this appeal is prosecuted.

The land selected upon which plaintiff has constructed its road, and to which it seeks an enforced conveyance by defendants, is located partly along the north bank of the North Fork of Kentucky river and partly in the bed of that stream, there being between six hundred and eight hundred feet of the track located lengthwise in the stream; and at a point opposite defendant's dwelling the dump upon which the track is constructed occupies more than one-half of the original bed of the stream. By thus locating its track the water is caused to wash away the south bank of the stream and defendants' bottom land on that side is made to overflow, leaving deposits of sand. The bed of the river on that side, because of the excessive amount of water flowing at that point, has been cut out much deeper than it was before the construction of the railroad; a footbridge which defendant had across the stream has been destroyed, as has the only road which he had leading from the public road to his dwelling.

Defendants resisted specific performance upon several grounds, chief among which was fraud and mistake in

the execution of the contract, and that it was not within the contemplation of the parties that the railroad would be located along, and in the bed of the river. The stream at that point is perhaps one hundred feet wide, with running water at all seasons, and at times becomes turbulent. The lower court wrote no opinion, and we are not informed as to his reasons for denying the relief, but under the view which we take of the facts of the case we are convinced that the judgment finds ample support from the rules of equity governing application of the remedy of specific performance, and this independent of the charge of fraud in the execution of the contract, which charge is not established.

Aside from the facts which we have stated, it appears that the defendant, Hiram Williams, who was the only one consulted at the time of the execution of the contract, is a plain, plodding farmer, uneducated, scarcely able to read print, and wholly unable to read writing, although able from practice to write his name. In the very recent case of *Darnell v. Alexander*, 178 Ky. 404, in considering the application by the courts of the equitable remedy of specific performance, we had occasion to say:

“No rule of equity is more deeply rooted in the law than the one that a specific performance of a contract is not granted as a matter of right, but it is always addressed to the sound and reasonable discretion of the court to be exercised according to the circumstances of each case. This discretion, however, is not an arbitrary or capricious one, but is a sound judicial discretion to be exercised according to the principles of equity. 36 Cyc. 548-9; *Pomeroy's Equity Jurisprudence*, sec. 1405; 2 *Story's Equity*, secs. 769 and 742; *Bowman v. Irons*, 2 *Bibb* 78; *Petty v. Roberts*, 7 *Bush* 410; *Cocanougher v. Green*, 93 Ky. 519; *Woolums v. Horseley*, *idem.*, 582; *Williamson v. Dills*, 114 Ky. 962, and *Heydrick v. Dickey*, 155 Ky. 222.”

In addition to the text books and cases there referred to as circumscribing the application of this remedy, we may add *Pomeroy on Contracts*, sec. 33; *Eastland v. Vanarsdale*, 3 *Bibb* 274; *Berry v. Frisbie*, 120 Ky. 337, and *Jones v. Prewitt*, 128 Ky. 496. In the *Williamson* case, *supra*, addressing itself to the question in hand, the court said:

"Specific performance will not be decreed if the contract and situation of the parties be such that the remedy of specific performance will be harsh or oppressive." And quoting from Pomeroy's Equity Jurisprudence, sec. 1405, the court also said: "The oppression or hardship may result from unconscionable provisions of the contract itself, or it may result from the situation of the parties unconnected with the terms of the contract, or with the circumstances of its negotiation and execution, i. e., from external facts or events or circumstances which control or affect the situation of the defendant."

The authorities referred to, and others which might be mentioned, in prescribing the caution with which courts should act when called upon to specifically enforce a contract empower them to more favorably consider the defendant's claim in resisting the performance than those of the plaintiff in seeking to enforce it. Thus in the *Woolums* case, *supra*, it is said:

"There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill, than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically, the party is left to his remedy at law.

"Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree, where the plaintiff will not always be allowed relief upon the same evidence.

"A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract and yet refuse its specific performance."

The harshness or oppression which an enforcement of the contract would entail, sufficient to deny its execution, may arise in many ways. It need not be founded upon either fraud or mistake in entering into the con-

tract as those terms are usually understood. Nor need the contract be tainted with such undue advantage as would authorize its cancellation. It is sufficient if an enforcement of the contract would produce conditions highly inequitable and unjust to the defendant, followed by injurious consequences which he can not be deemed to have contemplated when he executed the contract so as to make its execution operate harshly and oppressively upon his rights. As stated in *Pomeroy on Contracts, supra*, sec. 188, the hardship authorizing equity to refuse specific performance may arise "from something collateral or incidental to, but still connected with the contract, and because not involved in the express provisions not therefore so likely to have been suggested to the parties as possible; at all events, there is no presumption that it was thus foreseen; from events and circumstances entirely independent of any provisions of the contract—perhaps arising subsequently—and, therefore, a result which the parties could not have expected nor anticipated."

Some of the conditions and circumstances under which the remedy will be refused arise from and grow out of inadequacy of consideration and inequality in business experience and capacity of the parties at the time of the execution of the contract, i. e., where one of them is educated, well versed in business affairs and better prepared to know and comprehend the import of the contract than the other, although such inequality in these respects might not, standing alone, amount to actual fraud.

Coming now to the application of these legal principles to the facts of this case, let us see whether the court was correct or incorrect in dismissing the petition. In the first place there is great disparity between the parties with reference to educational and business qualifications. The small price of fourteen dollars in payment for the land actually taken, and in payment "of all claims for damages" to the rest of the farm because of the appropriation of the land taken is grossly inadequate when viewed in the light of the damages produced because of the location of the right of way and the construction of the road in the bed of the river. While inadequacy of price alone, under the authorities, *supra*, might not be sufficient to deny the relief sought, it is a fact which may be taken into consideration by the court, with other un-

just and inequitable circumstances, when called upon to grant the relief.

The defendant, aside from the damages produced by the water of the river overflowing his land and washing away the creek next to his residence, loses his footway across the creek to the public road, and also his way of ingress and egress to his home. These consequences are so unfair, unjust, harsh and oppressive, when viewed in the light of the meager consideration received, as to at once force the conclusion that they were not in the contemplation of the parties, or at least that of the defendant at the time he entered into the contract. Indeed it would have required great foresight on the part of one of considerable experience and astuteness to have contemplated that the terms of the contract sought to be enforced were broad enough to confer upon plaintiff the right to select for its right of way and to construct its road longitudinally upon any part of defendant's farm covered by the bed of the river. When so located the damages to the rest of defendant's farm would continue to accrue from time to time as the waters of the river encroach upon his residence south of the river and overflows of his bottom land periodically occur. Evidently the damages which he released and which the parties had in contemplation were those that at once accrued upon the construction of the road. They necessarily did not have in mind continuing and recurring damages growing out of its location, since such damages are almost if not quite incapable of measurement in advance.

Furthermore, equity in administering this character of relief in the exercise of a sound discretion lodged with the court should strictly construe the contract against the one seeking its enforcement where harsh and oppressive results would follow, although not to the extent as to be alone sufficient to deny the relief. Under this rule, we have but little doubt in holding that the terms of the contract literally construed do not provide for the appropriation by plaintiff of any part of the bed of the river (except by crossing it) for its right of way.

Only two kinds of land are mentioned in the contract, they being "bottom land" and "hill land." The meaning of the word "bottom" as designating a particular character of land is defined by Mr. Webster as "low land formed by alluvial deposits along a river; low lying ground; a dale; a valley, an intervalle." It is

true that another definition of the word "bottom" as being "the bed of a body of water, as of a river, lake or sea," is given by him, but that definition is not intended to be a descriptive term of any particular character of land, but is only a definition of that which lies underneath and supports the body of water. The same author defines the word "hill" as applied to the surface of land as "a natural elevation of land of local area and well defined outline." We are not without judicial definition as to what is meant by the word "hill," as applied to land. In the case of *Kerr v. DuVall*, 62 Oregon, 470, in construing the meaning of the phrase "at the foot of the hill," the court said that the term "hill" meant "the beginning of an abrupt rise." It is a matter of universal knowledge that "hill land" applies to and includes all land which is not "bottom land," but neither of them as commonly understood includes the bed of a stream. With the defendant in this case no doubt viewing the terms of the contract to mean as we have just indicated, equity will not hesitate to deny specific performance of the contract when it is sought thereby to appropriate the bed of the river and when such appropriation would be followed by the harsh consequences enumerated.

In view of all the foregoing, we find nothing in this record that would favorably appeal to the sound legal discretion vested in the chancellor in behalf of the plaintiff. The cases referred to and relied upon by plaintiff's counsel do not apply, since they deal with claims of actual fraud, mostly appearing in executed contracts; the quantum of proof necessary to establish fraud, &c., questions not necessary to the decision of this case. Nor is the case of *Curry v. Kentucky Western R. R. Co.*, 25 Ky. Law Rep. 1372, in conflict with this opinion, since the facts in that case are quite dissimilar to those appearing in this record.

Other questions are presented, among which is that defendant can not be required to execute a deed when he was only a joint owner of the land and when his wife declined to join him in the execution of the contract. But, in view of what has been said, it is unnecessary to discuss this question, and the same is true with reference to the others presented.

After the filing of this suit defendant and his wife filed an independent one, seeking to recover damages upon the basis of condemnation proceedings, and which

suit is now pending. Nothing herein said is intended to affect that suit.

Perceiving no error in the judgment, it is affirmed.

American Beet Sugar Company v. Turk-Wilson Grocery Company.

(Decided February 21, 1919.)

Appeal from McCracken Circuit Court.

Appeal and Error—Evidence.—The fact that the evidence in the case is conflicting or that this court would have found differently on the facts does not give or furnish cause or ground for setting aside the verdict. In this case but two witnesses testified on the main issue—one for appellant and one for appellee—so this court cannot say the verdict is against the weight of the evidence. Theories of both parties were submitted to the jury under proper instructions.

MOCQUOT & BERRY for appellant.

WHEELER & HUGHES for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

The appellant is engaged in the business of manufacturing and selling sugar. The appellee is engaged in the wholesale grocery business in Paducah. O. P. Leigh & Co. are brokers in the last named city, and Meinrath Brokerage Company is a brokerage concern located in Chicago.

July 12, 1916, a member of the firm of O. P. Leigh & Co. went to the office of the appellee and informed Mr. Wilson they could sell him beet sugar, to be delivered at Metropolis, Ills., at a given price. An order was given this brokerage firm for two cars of beet sugar, of 800 bags each, the order for each car being given at different times during the day.

It is claimed by appellee the sugar was not delivered at the time agreed upon, and the sugar market was down when the sugar was received. In sending a check to appellant, in settlement of the first car, appellee deducted \$400.00, on account of the difference in the market price; in settlement of the second car it deducted \$708.00

for the same reason, and \$55.61 freight from Metropolis to Paducah.

Aside from the testimony of G. S. Scott, a member of the firm of O. P. Leigh & Co., relative to the order for the second car, only two witnesses testified in this case, to-wit: O. P. Leigh in behalf of the appellant (plaintiff below), and Rollie Wilson in behalf of appellee.

The broker's authority was given in a telegram of July 12, 1916, from the Meinrath Brokerage Company, which stated the price at which sugar was to be sold, shipments commencing about July 22nd, to the Illinois market.

Mr. Leigh testified that after the telegram, which was in code, had been deciphered, he showed it to Mr. Wilson, who read it, and thereupon gave him the order for the one car, and later, in telephone conversation with Mr. Scott, he gave the order for the second car. The conversation is thus related by Mr. Leigh: "Q. Tell the jury what happened when you went in and sold him this sugar? A. I went to Turk-Wilson and offered Mr. Wilson this sugar at a certain price of \$7.47½ at Metropolis, the freight prepaid to Metropolis, to be shipped about the 22nd. Q. That was the trade, was it? A. Yes, sir. Q. To be shipped about the 22nd? A. Yes, sir. . . . Q. The American Beet Sugar Company to pay for it to Metropolis and Turk-Wilson to pay for it from there here, and it was to be shipped about the 22nd? A. Yes, sir. Q. Was anything said about when this sugar commenced to be manufactured? A. About the 22nd. Q. Was anything said between you and Wilson about when it was to be manufactured? A. I showed him this telegram."

Mr. Wilson states that when Mr. Leigh came to his office he had something in his hand, but it is not clear from his testimony whether or not he read the telegram. When asked about the contract with the appellant he states: "Mr. Leigh came in the store one morning early—in the early part of July—and walked up to the desk and said, 'Rollie, do you want to buy some beet sugar?' and I said, 'Yes, at what price?' and he said, '\$7.47 per hundred,' and I said, 'It depends entirely on when it was to be shipped,' and he said, 'It would be shipped July 22nd, and would be \$7.47 per hundred at Metropolis,' and I said I would take a car, and then late in the afternoon Mr. Scott rang up and said, 'We have confirmation

on the car of sugar, but the price is up; however, I think I can get you another car at the same price."

Thus it will be seen that the issue involved narrows itself down to the contract made between the parties on the date mentioned; Mr. Leigh insisting that shipment was to be made on or about July 22nd, Mr. Wilson being just as emphatic in his statement that it should be shipped by the 22nd of July, i. e., to be shipped on that date and not later than that date.

The first car was shipped August 2, the second one in September. From the original correspondence, which is in the record, it appears that appellee wrote the appellant on July 18, asking that the order be scaled down to 800 bags, and this letter referred to the receipt of a memorandum No. 13 M., dated July 13, this being a memorandum of the sale of the sugar, providing for shipment as follows: "800 bags as soon as possible after beginning factory operation, 800 bags as ordered within 30 days, seller's option of routing. Orders for shipment to be furnished by purchaser."

In response to a circular letter from the Chicago brokers, dated July 25, 1916, asking for shipping instructions, appellee wrote the Chicago brokers stating that the sugar was bought with the distinct understanding that one car of it would move July 22nd, and as this car was not shipped appellee insisted that it be cancelled. This was before the first car was shipped. August 17th, and prior to the shipment of the second car, appellee notified the Chicago brokers, representing appellant, that as the remaining car was not shipped on the 22nd, appellee would pay for the sugar on the basis of 25c under the price of cane sugar, the day received. Appellee settled on this basis. In the voucher checks sent in payment of the two consignments there is this notation, "The attached check is in full settlement of the items listed. Return if incorrect."

After the proof was heard the case was submitted to the jury, the court giving two instructions—one tendered by the appellant and the other by the appellee. The jury returned a verdict in appellee's favor.

This court has written time and again that unless the verdict of the jury is flagrantly against the evidence the judgment will not be reversed. In this case there are but two witnesses testifying to the facts in issue, one on one side and one on the other.

The mere fact that the evidence is conflicting, or that this court would have found differently on the facts, or that in its opinion the verdict is against the weight of the evidence would give and furnish no cause or ground for setting it aside. Before this can be done it must be apparent that the verdict is clearly and palpably against the evidence. Such is not the case here. The jury was instructed upon both theories of the case and found the contract to be as claimed by appellee.

As there was sufficient evidence to carry the case to the jury upon the issues submitted, it is not within our province to interfere with or disturb the jury's verdict. *White Sewing Machine Co. v. Mahoney, et al.*, 156 Ky. 805; *Lou. & Int. R. R. Co. v. Roemmele*, 157 Ky. 84; *Jellico Coal Mining Co. v. Walls*, 160 Ky. 730; *Interstate Coal Co. v. Garrard, by, etc.*, 163 Ky. 235; *Miller's Admr. v. Ewing*, Same 401; *Forestal v. National Surety Co., et al.*, 168 Ky. 552.

Judgment affirmed.

Trosper Coal Company v. R. C. Tway Mining Company.

(Decided February 21, 1919.)

Appeal from Knox Circuit Court.

1. **Appeal and Error—Transcripts of Record—Omitted Pleadings.**—Where the clerk's transcript of the record shows that part of the pleadings and all of the evidence have been omitted it will be conclusively presumed against the appellant that the omitted pleadings and proof sustain the judgment.
2. **Appeal and Error—Court of Appeals is Court of Errors.**—Where appellant in the lower court based his cause of action, as well as his defense to a counterclaim, upon a written contract and both parties thereto treated the contract as binding until cancelled under one of its provisions, both in their transactions with each other and in the trial in the lower court, an objection by the appellant for the first time in this court that the contract was void comes too late, as this is a court of errors and without original jurisdiction in such matters.

N. R. PATTERSON for appellant.

BLACK & OWENS for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Appellant instituted this action to recover \$4,625.11 for coal alleged to have been sold and delivered to appellee under a written contract of date May 25, 1916, filed with and made part of the petition.

The contract provides for the delivery by appellant to appellee of 156 cars of nut and slack at sixty cents a ton, deliveries to be made at the rate of three cars a week beginning June 1st, 1916, and that "if at any time the credit of the buyer (appellee) should become impaired, unsafe or unsatisfactory to the seller (appellant) it should have the privilege at its option, without further notice, to terminate this contract and to be immediately relieved from all obligations hereunder."

For answer and counterclaim appellee, admitting the contract, denied the delivery thereunder of \$4,625.11 worth of coal or coal of any value for which payment had not been made in excess of \$202.15, and in a second paragraph alleged appellant had failed to ship it, as the contract required, fifty-two cars of coal during the months of August, 1916, to January, 1917, inclusive, to its damage in the sum of \$8,500.00; and forty-eight cars of coal in the months from February to May, 1917, inclusive, to its further damage in the sum of \$5,184.00; a total of \$13,684.00, for which it prayed judgment against appellant, less \$4,625.11, the amount sued for, which was in this paragraph admitted to be due appellant.

In addition to a traverse of the allegations of the counterclaim appellant, in a second paragraph of its reply, plead as an affirmative defense thereto that "the credit of the defendant did become unsatisfactory to it at the time of the alleged failure to ship coal and that because of that fact this plaintiff then and there refused to ship *further* coal to the defendant," as under the terms of the contract it had a right to do without notice.

The court having overruled its motion to strike this second paragraph of the reply, appellee according to an undated order, found upon page 21 of the clerk's transcript of the record, filed a rejoinder which is not copied into the record appellant has brought here.

The record also shows that a jury was waived, the case submitted to the court and "the official stenographer was then called to take down the testimony in the case;" while the judgment adjudging that plaintiff recover of defendant \$4,625.11 and that defendant recover of plaintiff \$4,625.11 and its costs, recites that "the court has

heard all the evidence, argument of counsel and being advised adjudges, &c."

Appellant did not file a motion for a new trial and has not brought up any of the evidence heard, nor the appellee's rejoinder, which may have, and probably did, put in issue or avoid the affirmative allegations of appellant's reply; hence, since the appellant must exhibit in the transcript so much of the record as will show affirmatively that the decision complained of is erroneous there is nothing before us but the conclusive presumption that the omitted pleadings and evidence sustain the judgment. *Huffaker & Shy v. National Bank of Monticello*, 13 Bush 644; *Bowman v. Holloway*, 14 Bush 426; *Bean v. Meguiar*, 16 K. L. R. 715; *McNew v. Williams*, 18 K. L. R. 364; *Braswell v. Hurley*, 149 Ky. 205; *Heard v. Cherry*, 150 Ky. 319.

But appellant also seeks to make the point here that the contract was absolutely void for lack of mutuality, contending that as it had the absolute right to cancel at any time without notice it was never bound thereby. This contention, however, comes too late when first presented in this court. Appellant declared on the contract in both its petition and its reply, and presented in the lower court only the issue of fact that it was annulled after its partial observance for a time by both parties and that *after its cancellation* appellant was not liable for a failure to comply therewith.

As the parties not only treated the contract as binding until actually cancelled in their transactions with each other, but also upon the trial in the lower court of their disagreements arising thereunder, we must accept here that construction as this is a court of errors and without original jurisdiction in such matters.

Wherefore the judgment is affirmed.

Carter v. Howard, et al.

(Decided February 21, 1919.)

Appeal from Rockcastle Circuit Court.

1. **Judicial Sales—Inadequacy of Price.**—Mere inadequacy of price is not sufficient to set aside a decretal sale of property, but where the price bid is greatly disproportioned to the actual value, only slight additional circumstances are required to order a resale.

2. Judicial Sales—Exceptions—Infants.—Where rights of infants are involved the court will be more liberal in sustaining exceptions to commissioners' reports on the ground of gross inadequacy of price.
3. Judicial Sales—Notice.—Under the Civil Code of Practice, sec. 696, unless the order otherwise directs, notice of sale under order of court shall be made at the door of the court house of the county.
4. Judicial Sales—Notice.—Where the judgment directed posting of notices at the door of the court house and in the vicinity of the property to be sold, and also a publication in a newspaper, it was necessary that the directions of the judgment be complied with, publication in the newspaper alone being insufficient.
5. Judicial Sales—Notice.—Where the report of sale recites that the property is advertised as directed by the judgment there is a presumption that the commissioner performed his duty, but this presumption may be rebutted by testimony showing the notices were not posted as required by the judgment.

L. W. BETHURUM and A. E. MILLER for appellant.

C. C. WILLIAMS for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

At a sale by the master commissioner of certain real estate involved in this litigation the appellant became the purchaser thereof at the price of \$500.00. Exceptions to the report of sale were filed by the appellees on the ground that the price was grossly inadequate, and that the property was not properly advertised. The court having sustained said exceptions to the master's report and ordered a resale of the property appellant prayed and was granted an appeal to this court from said order.

1. It is the rule in this state that a decretal sale of property will not be disturbed for mere inadequacy of price, unless there has been such a sacrifice of the property as to import fraud. There must be either fraud or misconduct of someone connected with the sale, some surprise or misapprehension on the part of those interested or the officer who conducts the sale, or some irregularity in the proceedings, or other circumstances attending it, conducing to show unfairness, before the chancellor will refuse to confirm this act of the commissioner. *Stump v. Martin*, etc., 9 Bush 285. To the same effect is *Bean, etc. v. Haffendorfer Bros.*, 84 Ky. 685, wherein the court says: "But when the price bid is greatly dis-

proportioned to the actual value of the property, only slight additional circumstances are required to justify and make it the duty of the chancellor to set it aside." See *Morton v. Wade, Jr., et al.*, 175 Ky. 564, 24 Cyc. 39.

But where the rights of infants are involved the court has been somewhat more liberal in sustaining exceptions to commissioners' reports on the ground of gross inadequacy of price. *Steel, et al. v. Wood's Admr., et al.*, 144 Ky. 254; *Buckner's Trustee, et al. v. Buckner, et al.*, 168 Ky. 302; second appeal, same case, 180 Ky. 350, reported under the style of *Castleman v. Buckner, et al.*

Several witnesses introduced in behalf of the appellee testified that in their opinion the property is worth from \$1,500.00 to \$2,000.00. On the other hand quite a number testified that the property is not worth exceeding \$750.00; hence the proof is not sufficient to justify us in saying that the price bid by the appellant is grossly inadequate. There is evidence to the effect that a person has been found who is willing to bid \$1,000.00 for the property in the event of a resale, and reference is made to an affidavit to this effect, but we do not find the affidavit in the record. In this state of the evidence while upon a resale the property would doubtless bring more, this is not of itself sufficient ground to authorize a resale.

2. The point made that the property was not properly advertised is a more serious one. Section 696 of the Civil Code provides: "Every sale made under an order of court must be public, upon reasonable credits to be fixed by the court, not less, however, than three months for personal, nor six months for real property; and shall be made after such notice of the time, place and terms of sale as the order may direct; and, unless the order direct otherwise, shall be made at the door of the court house of the county in which the property, or the greater part thereof, may be situated; and the notice of sale must state for what sum of money it is to be made."

In section 14a, subsec. 1, of the Kentucky Statutes, it is provided: "That in addition to the notices now required by law to be posted all public sales of any kind of property, when sold under execution, judgment or decree, shall, unless otherwise agreed upon by the parties to such execution, judgment or decree, be advertised in some newspaper published in the county of such sale, if any newspaper be therein published, at least once a

week for three consecutive weeks next preceding the day of sale; Provided, That in counties where there is a daily newspaper published or in general circulation, publication of such notice of sale for three consecutive days next preceding the day of sale shall be sufficient. The advertisement shall state the time, place and terms of sale and shall give a description of the property to be sold; Provided, That the newspaper advertisement herein provided for shall not be necessary where the appraised value of the property to be sold is less than one hundred dollars, to be ascertained by appraisal in each case as now provided by law."

Proof for the appellee shows that the property was not advertised as directed in the judgment, other than the publication in the newspaper. In other words, there was no notice posted at the door of the court house, nor in the vicinity of the land; nor is there any proof showing that this was done. Indeed, the commissioner himself does not testify that the property was advertised according to the provisions of the judgment though his report recites that "the sale was advertised as directed in the judgment." He was asked and made the following answers to certain questions in his deposition: "Will you state, Mr. Griffin, as to whether or not the sale of that land was advertised by putting up notices of the sale at the front door of the court house in Mt. Vernon, Ky. A. Yes, sir. I can't state for certain whether it was or not. Q. Did you put up such advertisements? A. I did not. Q. Did you put up advertisements that this property would be sold, on the land, or near the land? A. I did not myself. Q. You then do not know, in point of fact, whether or not there was any advertisement at all only the one in Mt. Vernon Signal, do you? A. I am telling you all I know about it. I got a copy of the advertisement and filed it with my report. That is all I know. Q. Where did you get that copy, Mr. Griffin? A. I can't state whether I taken it off the bulletin board or not, but that is my custom to do that. To take the one off of the court house door and file with the report of land sale. I file that paper with the report of land sale, but I can't say for sure whether I taken it off of there or not in this case. Q. But you do not say that you did take that advertisement off of the bulletin in this case? A. I can't say for sure I did in any case."

As will be seen from the above he testifies that it was his custom to take the copy from the bulletin board at the court house, and file it with his report, and while he says in one place he thinks he followed his custom in this case, yet he is not certain about it.

In *Harris v. Gunnell*, etc., 10 Rep. 419, a case presenting facts very similar to the present one, the court says;

"The judgment, however, provided that the sale should be advertised at the court house door of the county in which the land is situated, and at *'three or more public places in the vicinity of the land.'*"

"The commissioner, in his report, says that he advertised the sale as required by the judgment. This, in the absence of testimony, should be taken as true. The presumption is in favor of a proper performance of his duty. But he was introduced as a witness, and his testimony shows that he did not know whether the statement was correct or incorrect. This rebuts the presumption arising upon the face of the report that he did his duty. Upon such a state of case a sale prejudicial to the owner of the property should not be upheld unless it be shown by testimony that the land was advertised as required by the decree."

In the above case the commissioner testified that he posted the notice at the court house door, and sent copies to be posted in the vicinity of the land, but that he did not know if any of them were received or posted, and the court says from the evidence it does not appear that the sale was advertised at the court house door, and *three or more* public places in the vicinity of the land as required by the decree. The court affirmed the judgment ordering a resale.

Price v. Simpson, 8 Rep. 327. The court here says it is the duty of the commissioner to advertise property ordered to be sold, and the commissioner being unable to state that the property had been advertised as the law required, it was held that the exceptions to the commissioner's report should have been sustained.

Both sides to this appeal rely upon the case of *Scott v. Graves*, et al., 153 Ky. 221. We have examined the judgment in this case and it provides: "Before making said sale the master commissioner will cause the time, place and terms thereof and a description of said property to be advertised at least ten days, including the day

of sale, in the State Journal, a daily newspaper published in Frankfort, Ky."

The court decided this was a sufficient advertisement under the sections of the Code and statute above referred to. It will be noted in the Code provision that the sale shall be made after such notice of the time, place and terms of sale as the order may direct. The order in *Scott v. Graves, supra*, directed the publication in the State Journal. The judgment in the present case directed that notice be posted at the court house door, at three other places in the vicinity of the land, and published in the Mt. Vernon Signal, but the notices of sale were not posted or made as directed by the judgment.

Speaking on this subject we quote as follows from the case of *Scott v. Graves, supra*: "While in the case of sales of land under execution, the posting of written notices at the court house door and three other public places in the vicinity of the land is required, subsection 2, section 682, Kentucky Statutes, there is no provision of the Code or statutes requiring the posting of such notices in the case of sales made by a master commissioner. The only statutory limitation on the power of the court to direct how the sale shall be advertised is contained in section 14-a, *supra*, which provides that such sale shall be advertised in some newspaper published in the county of said sale at least once a week for three consecutive weeks next preceding the day of sale; with a proviso that where there is a daily newspaper published in said county, publication of such notice of sale for three consecutive days next preceding the day of sale shall be sufficient. We conclude, however, that in addition to this statutory limitation, the right of the court under section 696 of the Code, *supra*, to fix the manner of advertising the sale is subject to the further limitation that the advertisement shall be reasonably sufficient to properly advertise the sale.

"In the present case, the sale was directed to be advertised in the State Journal, a daily newspaper published in Frankfort, Kentucky, for a period of ten days, including the day of sale. The advertisement, therefore, not only complied with the terms of the statute, but we think was reasonably sufficient."

There is testimony to the effect that people in the vicinity of the property talked about the sale, and thus it was generally known, but notice by word of mouth

is not authorized by the law and can not be approved by this court.

Had the judgment in the instant case directed publication in the Mt. Vernon Signal only, this would have satisfied the Code and statute. However, it provided for further advertisement and it was this part of the court's order that was not complied with.

Measured by the terms of the judgment, the sale of the property was not sufficiently or properly advertised. This being true, the lower court did not err in sustaining the exceptions to the master's report of sale.

Judgment affirmed.

People's Savings Bank, et al. v. Wright, et al.

(Decided February 21, 1919.)

Appeal from Ohio Circuit Court.

1. **Appeal and Error—Finding of Chancellor.**—Where the evidence preponderates in such a way as to convince the appellate court that the chancellor has erred in his finding of fact, the judgment should be reversed.
2. **Bills and Notes—Release—Evidence.**—Defendant in a suit upon notes executed by him, as part price for machinery purchased, pleaded that he was released from liability thereon, by the obligee accepting as sole payor, one to whom the defendant sold the machinery, evidence examined and held to be insufficient to establish the release contended for.
3. **Bills and Notes—Release—Acceptance—Consideration.**—The acceptance of a stranger to the note as payor constitutes sufficient consideration for the release by the payee of the original maker.

GLENN & SIMMERMAN for appellants.

HEAVRIN & MARTIN, WOODWARD & KIRK and A. D. KIRK for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

On June 6, 1910, L. T. Wright and L. C. Craig purchased from the Heilman Machine Works, a corporation at Evansville, Indiana, hereinafter called "the company," a traction engine, a threshing outfit and a small sawmill, for which they agreed to pay the sum of \$2,200.00, none of which was paid in cash, but all of it by deferred payments distributed over a number of years,

and evidenced by promissory notes. A lien was retained upon the property purchased, and Craig also executed a mortgage on a small tract of land he owned. The purchasers operated the machinery, running the sawmill when not operating the thresher, for about a year, when Wright purchased the interest of Craig and at his solicitation the latter was released by the company from all obligation upon any of the notes, also releasing its mortgage upon Craig's tract of land. But the company, before it agreed to release Craig, demanded additional security from Wright, whereupon he and his son, Albert Wright, with the wife of L. T. Wright, executed a mortgage on two small tracts of land owned by the two Wrights and Albert Wright took the place of Craig as obligor on the notes. After that the Wrights operated the machinery in the same manner until some time in May, 1913, when another trade was gotten up between L. T. Wright and Craig whereby the latter again assumed control of the machinery and continued to operate it until about the time of or just before the filing of this suit. In the meantime L. T. Wright had made some small payments on the indebtedness, and in 1912 he executed a mortgage on a crop of tobacco, which was afterwards sold for \$247.50, for which the company gave him credit. He had also turned over to the company a second class engine which he owned, which was accepted at the price of \$575.00, with which sum he was also credited on the notes. After the second trade between Wright and Craig under which the latter operated the machinery he made some small payments for which the company gave proper credits, and at the time of the filing of this suit five of the original notes, aggregating \$1,050, were past due and unpaid, and to collect them the suit was filed against the two Wrights, Craig and Mrs. L. T. Wright, seeking a personal judgment against all of the defendants except Mrs. Wright, and an enforcement of the lien against the machinery and the land mortgaged by the Wrights. The notes, in the meantime, had been assigned and transferred by the company to appellant, the People's Savings Bank, who filed the suit, but the company, before a submission of the cause, came into the case by a proper pleading, adopting the allegations theretofore made by plaintiff in all of its pleadings. The Wrights answered and in substance claimed that they had been released from all liability upon the notes, which re-

lease, they alleged, was effected when they claim to have sold the machinery to Craig in May, 1913. They further insisted on additional payments which they alleged had been made and for which no credit had been given. By a separate answer Craig pleaded his release, which occurred some time in the year 1911, when his interest was purchased by the Wrights. Appropriate pleadings put these matters in issue and upon final submission, the court dismissed the petition as to the Wrights, but gave a personal judgment against Craig, and from that judgment the plaintiffs prosecute this appeal, but there is no cross-appeal prosecuted by Craig.

It is insisted by plaintiffs' counsel on this appeal that conceding the evidence to be sufficient to authorize a finding that the Wrights were released, as they claim, then there was no consideration for the release, and it therefore is not binding. This contention no doubt would be true if all of the original makers of the notes were at that time bound thereon, but the evidence is conclusive that in 1911 Craig had been released from all liability on the notes, and the mortgage which he had executed upon his land had been surrendered and cancelled. This, as we have stated, was upon the consideration that the Wrights executed a mortgage upon the land sought to be sold in this case. If Craig was released in 1911, he became, as between him and the obligee in the notes, as much a stranger to them as if he had never executed them. So that in 1913, when the Wrights claimed that they were released by Craig assuming the payment of the notes, if the company agreed to that arrangement and agreed to look to Craig alone for their payment, he at that time not being obligated thereon, there was a sufficient consideration for the novation, and this contention can not be upheld. The controversy is then reduced to but one issue, which is one of fact, it being whether the company agreed to release the Wrights and to look only to Craig for payment of the notes at the time the latter took charge of the machinery in May, 1913.

We have carefully read all of the testimony in the record, some of it more than once, and we have failed to find any witness who testified in the case supporting the contention of the Wrights, save L. T. Wright himself. He testified in substance upon this issue that he had gotten tired of running the mill, and he had concluded to sell out to Craig and notified the company of that fact,

and that it sent its representative, Mr. Gibson, who agreed to the arrangement and to release Wright, and that it was agreed that his mortgage and notes should be immediately sent to him, which, however, was never done, and about which he does not appear to have been seriously concerned. No writing of any character was entered into at the time, as had been done when Craig was released, two years before. Another witness, upon whose farm the mill was being operated at the time, said that Gibson told him that Mr. Wright was "out of it," but Gibson denies the testimony of both Wright and the latter witness. However, the statement, if true, that Wright was "out of it," viewed in the light of the facts, was by no means inconsistent with the latter's continued liability. Prior to the time that statement is alleged to have been made there had been continuous efforts to procure payments to be made on the indebtedness, nearly all of which were fruitless. When the mill was turned over to Craig, at the time it is claimed the release of the Wrights was made, it was agreed that Gibson should collect from the man whose timber was being sawed at the rate of two dollars per hundred for the lumber, and it was with reference to this matter that the alleged statement, attributed to Gibson, was made. If made by him it was in a sense true, and was but a statement to show his authority to collect for the sawing. Prior to that time, Wright had moved the mill to that site and had entered into a contract to saw lumber for the witness who would be under obligation to pay Wright if the latter continued to operate the mill; and since under the arrangement for Craig to operate the mill the company was to collect a part of the charges for sawing the lumber, it would not necessarily follow that by the statement "Wright is out of it," alleged to have been made plaintiffs' representative meant that he was released from all liability upon the indebtedness, but only that he was relieved of the task of carrying out that particular contract of sawing which, under the arrangement, had been undertaken by Craig. Other statements in letters filed are equally reconcilable with the continued obligation of the Wrights upon the notes. A number of witnesses in behalf of the plaintiff testified positively that no such release as contended for was ever made. Neither Craig nor the engineer at the mill, both of whom were present, testified to any such release. Upon this point Craig

stated: "Q. Was anything said about Wrights being released or the notes surrendered, what about that? A. I do not remember about that."

The engineer testified that he did not hear the conversation, but that he was afterwards told by Mr. Wright that he had been released, which, of course, is no testimony at all. Albert Wright testified that Gibson told him that he and his father were released. This, however, is subject to the same explanation as is that which Gibson is alleged to have made to the witness Minton upon whose land the sawmill was being operated. So that if the case should be rested upon the testimony of the witnesses alone directly upon the point, it is extremely doubtful whether the finding of the chancellor that the Wrights were released could be upheld by us, under the rule governing our right to review findings of fact in equity cases. That rule is different between the verdict of a properly instructed jury and the judgment of the chancellor upon the facts. In the case of the verdict of a properly instructed jury, we are not authorized to disturb it unless it is flagrantly against the evidence, while the rule applicable to the judgment of the chancellor, rendered in an equity case, is that while his judgment as to the facts is on appeal entitled to some weight, yet this court will judge for itself of the sufficiency or insufficiency of the evidence, and if it is found to be insufficient to support the judgment, it will be reversed. But in addition to the testimony referred to, there are circumstances in this case which convince us almost beyond doubt of the error of the chancellor's finding that the Wrights were released. We have seen that no writing of any character was executed, evidencing in any manner the alleged release; and furthermore, if defendants' contention be true, the company not only released the Wrights from their personal obligation on the notes but also released the lien upon the land of both father and son for no other consideration than the personal obligation of Craig, whom all parties concede to be wholly insolvent. Such a course does not accord with the conduct of business men. It would have been entirely unnatural and from a business standpoint both unusual and inexplicable. Beyond these circumstances the record discloses that some time in September, 1913, about four months after the Wrights claim to have been released, L. T. Wright made a proposition to the company to release him from all liability on the

notes and surrender the mortgage upon the land of himself and son if he would pay the company \$650.00 cash, including the tobacco crop hereinbefore mentioned, and on October 13, 1913, he wrote the company a letter in which, after referring to preparing the mortgaged tobacco for the market, he says: "I will haul it off the first season, and I will know what I can do about taking up my notes. If my tobacco brings what it ought, I can pay you the \$650.00."

The proposition and letter just referred to are wholly inconsistent with the defense of a release relied on in the answer. In fact there is no accounting for either the proposition or the letter without the recognition of a continued liability upon the notes, so that when all the facts and circumstances are considered, we can find no escape from the conclusion that the court's finding that the release had been granted was not only against the weight of the evidence, but against the great preponderance of the evidence. Under the rule, *supra*, it is not only our right but our duty to find the facts in accordance with the testimony. This compels us to hold that no release had ever been granted, as contended for.

Wherefore, the judgment is reversed with directions to render judgment against L. T. and Albert Wright as prayed for, and to credit it with the proceeds of the machinery which has been ordered sold, and then direct the mortgaged land, or enough of it, sold to pay the balance of the judgment, and for such further proceedings as are not inconsistent herewith.

**P. Bannon Pipe Line Company v. Battle's
Administrator.**

(Decided February 11, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, First Division).

1. Negligence—Contributory Negligence.—Contributory negligence does not bar a recovery, unless, but for the contributory negligence, the injury would not have been incurred.
2. Negligence—Contributory Negligence.—Contributory negligence does not bar a recovery, if the party, perpetrating the injury, was under a duty to exercise care and could have, by the exercise of ordinary care, averted the consequences of the injured one's negligence.

3. Master and Servant—Care to be Exercised for Safety of Another.—Where a duty rests upon one to exercise care for the safety of another, and although slight injury may be unavoidable, the duty is incumbent upon him, not to inflict any greater injury, than is unavoidable, although the injured one, himself, may have been negligent.
4. Master and Servant—Assumption of Risk—Contributory Negligence.—It is the duty of a master to be reasonably careful to prevent accidents and injuries to his servants, and his failure to do so, will render him liable, unless the servant assumes the risks or contributes to the injury, by his negligence.

FRED FORCHT and CHARLES W. MORRIS for appellant.

ELMER C. UNDERWOOD, WALTER STOKES and D. R. CARPENTER for appellee.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

Searcy Battle was an employ of the appellant, P. Bannon Pipe Line Company. He was a strong, healthy man, thirty-six years of age, and of sober, industrious habits. He had been an employe of the appellant, for several months, and had been doing the same work for it, during that time. The appellant owned and operated a factory for the making of terra cotta tile, pipe, and brick, and used, for the purpose, large quantities of clay and shale. The clay and shale were brought to the factory in freight cars, which had doors, near each end of the cars, which could be opened, and the contents of the cars, allowed to drop underneath the cars. The cars were brought under a shed, attached to the factory, upon a switch, which connected with the main line of the railroad, and underneath the shed, and below the surface of the floor, were two "conveyors." The "conveyors" were troughs, the tops of which were even with the surface of the floor, and the exposed portions, were a length equal to the width of the switch track, and each of them, was about eighteen inches in width and about fifteen inches in depth. Within the trough, was a revolving shaft, which was armed with numerous sharp blades, set upon the shaft in a spiral fashion, making it into a kind of giant screw. The shaft, at one end, was set in a fixed bearing, which held it in position, while at the other end, it was attached to a shaft, which, in turn, was attached to, and operated by a steam engine, within the factory buildings, and about fifty feet from the opening. This engine propelled all the machinery made use of at the factory. When the cars,

loaded with shale and clay, were brought into the shed, upon the switch track, the doors were opened, and the contents allowed to fall into the troughs of the "conveyors," where, by the action of the revolving shaft, armed with the steel blades, set in spiral fashion, the clay and shale were crushed, and the crushed product was carried forward, to a belt, which carried and dumped it into a hopper, where it was ground into a condition to be turned into the finished products of the factory. When the cars were emptied of their contents and removed, the portions of the clay and shale, which were left upon the floor of the shed, were gathered by shovels or spades, and thrown into the "conveyors." The shafts in the "conveyors," made about thirty revolutions per minute. The two "conveyors," were about twenty feet apart. According to the evidence for appellee, the floor of the shed adjoining one of the "conveyors," was faced with boards, making a firm foundation, while the other, and the one at which Battle suffered injuries, as will hereafter be related, was not provided with such facing, but the evidence for appellant, is to the effect, that the floors, upon each side of both "conveyors," were similarly faced. The action of the shafts, in the "conveyors," was controlled by a lever, which was to the side of the switch track. When the steam engine was in operation, the shifting of the lever, at either "conveyor," would start it to operating, and a shifting of the lever back to its original position, would stop the shaft instantly. Either "conveyor" could be operated independently of the other. The duties assigned to Battle, were to unload the cars, of their contents, into the "conveyors," and to shovel the portions of their contents, which did not fall from the cars, directly into the "conveyors," into them, with a shovel. In so doing, he was assisted by an employe, whose name was Smith. On November 24, 1915, a car had been emptied and removed from the shed, and by the direction of the foreman, who was immediately present, at the time, Battle and Smith were shoveling the contents of the car, which had not fallen directly into the "conveyors," into the "conveyor," the floor, at the sides of which there was no board platform, when Battle, from some inadvertence, or accident, stepped, with his right foot, into the "conveyor," when he, immediately, shouted to stop the machine, when Smith, alone, or together with the foreman, sprang to the lever, and shifted it, to the position, so as to stop the shaft. At this point, the evidence is very contradictory.

The foreman testified, that he and Smith sprang to the lever, at the same time, and shifted it, when the shaft, immediately, ceased to revolve, while Smith testified, that the foreman did not attempt to shift the lever, but ran to the engine, about fifty feet away, and caused the power to be turned off the machinery at that point; that the lever, although shifted, so as to stop the revolutions of the shaft, the shaft did not cease to revolve, for three or four minutes, and not until the engine was stopped; that, at the time Battle called to stop the shaft, and when the lever was shifted, so as to stop it, Battle's foot was caught in the "conveyor," only to the extent of up to the instep, but, when the shaft ceased to revolve, his right leg had been drawn into it up to a point, between his knee and hip joint, and his mangled and broken leg was wound around the shaft. When he stepped into the "conveyor," he was about the center of the switch track, or the middle of the exposed portion of the "conveyor," but, when the shaft ceased to revolve, he had been drawn, to the side, to which the spiral motion of the blades drew the contents of the "conveyor," a distance of between two and three feet, although he was resisting being drawn into it, by clinging, with his hands, to the objects, within his reach. He was removed as speedily as practicable, to a hospital, and a surgeon was called, at once, but, the necessity of unscrewing the bolts, which held the fastenings, took such time, that he was not removed from his painful position, for thirty or forty minutes. As soon as the necessary preparations could be made, his leg was amputated, but, he died within about two hours, after the operation, from the shock, suffered by him, and loss of blood. While the evidence, in regard to the condition of the machinery, at the time of the injury, was contradictory, there was evidence which tended to prove, that the lever which controlled the operation of the "conveyor," was provided with what is denominated, a "friction clutch," and that this clutch had been out of repair and defective, for some time, previous to the injury; that the lever, when shifted to stop the operation of the shaft, in the trough of the "conveyor," would not cause it to cease revolving, for fifteen or twenty seconds; that it had been necessary for the engineer of appellant to work upon and repair the lever and its attachments and adjustments, as often as twice per week, for five or six weeks, and on the morning of the day upon which the injury was incurred, that the

lever could not be made to start the "conveyor" to moving, and Battle reported this fact to the engineer, who, with tools, came and worked upon it, for a time, and then directed Battle to shift the lever to start up the operation of the "conveyor," which he did, and it started up, at once, and the engineer, then assured him, it was all right. There was no occasion to make use of the lever any more during that day, until it was attempted to be shifted, to stop the movements of the "conveyor," when Battle had stepped into it, when the lever failed to stop it, and the revolving of the shaft ceased only, when the power of the engine was stopped. It was proved, by expert machinists, who were acquainted with such machinery and had examined the "conveyor," that, if the lever was in proper repair, the shifting of it would cause the shaft to cease revolving instantly. Smith testifies, that he did not know how Battle came to step into the "conveyor's" trough, as his back was to him, at that time; the first thing, he saw of it, his foot was in it, and he cried out to stop the machine. The foreman testified, that Battle's side was to the trough, as he was gathering up the clay, with a shovel, and he just carelessly stepped into it. The medical experts gave testimony, to the effect, that, a healthy man, who had suffered an injury, no greater, than the loss of a foot, or the loss of a portion of a foot, would almost, certainly recover, with proper and seasonable treatment, but, that one suffering the extent of the injuries of Battle, would most probably die, from the shock, and loss of blood.

The administrator of decedent, instituted this action to recover the damages, suffered by the estate of decedent, because of his death, alleging, that the death was caused by the negligence of the employer. The appellant denied, that any negligence, upon its part, contributed to the decedent's death, and in addition, interposed pleas of contributory negligence and assumption of risks upon the part of decedent, as the proximate cause of his death. The jury returned a verdict for appellee, and fixed the damages, at the sum of \$1,500.00, and a judgment was rendered accordingly. The appellant's motion for a new trial being overruled, it has appealed, and urges, that the trial court erred in overruling its motion for a directed verdict, in its favor, at the close of the testimony for appellee, and at the close of all the testimony, as the only ground for a reversal.

The trough, containing the "conveyor," was open and obvious. The danger incident to stepping into it, was obvious, and must be appreciated by any responsible being. Battle seems to have stepped into it, from the fact, that he neglected to exercise ordinary care for his own safety.

If the facts, which the evidence for appellee tends to prove, are to be believed, and the inferences to be drawn therefrom, the negligence of Battle, would have only cost him his foot or a portion of his foot, and from such an injury, he would have escaped with his life, if the lever, which controlled the conveyor, had been in proper repair. Either Smith, alone, or he and the foreman, together, shifted the lever, instantly, upon discovering the peril of Battle, and if it had caused the revolving shaft to have instantly ceased, its movements, as the proof tends to show, it would have done, if not defective and in proper repair, his life would not have been sacrificed. The proof for appellee conduces to prove, that the lever, when shifted to stop the revolving shaft, failed to accomplish that purpose, and that the shaft did not cease to revolve, until the foreman had run to the engine, and procured its operation to cease. Assuming, then, for the present, that the evidence was of such a character, as to require submission to the jury, upon the question, as to whether or not the loss of his foot, alone, would not have caused his death, the question, then arises, as to whether or not, it was a duty, which the appellant, as the master owed to the deceased, as its servant, to use ordinary care to maintain the lever and its adjustments, in such a condition, that it would perform its functions properly, and was its failure to do so, negligence as to him?

It is insisted, that the negligence of the decedent, in stepping into the "conveyor" concurred in the negligence, if any, of the appellant, in failing to maintain the machinery in reasonably good repair, and for that reason, the appellee can not recover, because under such circumstances, the negligence of the decedent, was the proximate cause of his death, and in support of this contention, the principle, embodied in the cases of *Bauer v. I. C. R. R. Co.*, 156 Ky. 183, and *Smith v. C. N. O. & T. P. Ry. Co.*, 146 Ky. 568, are relied upon, but, they do not seem to be in point. Those were cases, wherein the injured parties were licensees, to whom the employees of the railroad company owed a lookout duty, but the negli-

gence of the licensees was such, that the lookout duty, was not effective. Contributory negligence is not a bar to a recovery for an injury, unless, except for the contributory negligence, the injury would not have occurred. Neither does it preclude a recovery for an injury if the party perpetrating the injury, could have, by the exercise of ordinary care, averted the consequences of the injured one's negligence where a duty rests upon him to take care. *Sullivan v. Louisville Bridge Co.*, 9 Bush 90; *P. & M. R. R. Co. v. Hoehl*, 12 Bush 43; *L. & N. R. R. Co. v. Robinson*, 4 Bush, 509.

Although the employees of a railroad company do not owe any duty to a trespasser, except to avoid injury to him, if they can, after having knowledge of his peril, they do owe to him the latter duty, which the dictates of civilization provide as an obligation to every one, and if they injure a trespasser, when by ordinary care, after discovery of his peril, they could have avoided injury to him, their negligence is the proximate cause of his injury, although he was first negligent. It seems, from analogy to the above principles, that where a duty to avoid injury to any one, although he may be a trespasser, exists, that the duty requires, that although slight injury may be unavoidable, the duty is incumbent, not to inflict any greater injury, than can be avoided, although the injured one may, himself, have been negligent. The application of these principles does not involve any question of comparative negligence, but, defines the liability of each one for his own negligence.

The rule applying to negligence, as between master and servant, follows, the same rules, as above stated, and a servant may recover, notwithstanding his own negligence, if the consequences of his negligence could have been avoided by the exercise of ordinary care on the part of the master, with relation to such matters, about which it was the duty of the master to exercise reasonable care.

A rule of general application to the duties of a master, is, that, he owes his employees, the duty to be reasonably careful to prevent accidents and injuries to his servant, and his failure to do so, will render him liable, and he can not avoid the liability, unless the servant assumes the risk, or contributes to the injury by his own negligence, and among the primary duties, which rest upon the master, is to exercise care to provide a reasonably safe place for the servant to work, and reasonably safe

machinery and appliances with which to work. The machinery may be inherently dangerous in its use, but, it should be kept in reasonably fit condition for the use, in which it is employed. *Buey's Admx. v. Chess & Wymond Co.*, 27 R. 198; *C. N. O. & T. P. Ry. Co. v. Ashcraft*, 116 S. W. 297; *Conrad Tanning Co. v. Munsey*, 25 R. 936; *Quaid v. Cornwall*, 13 Bush 601.

In the instant case, the "conveyor" was obviously a dangerous instrumentality. It was open and necessarily so, for the purposes for which it was used. It was in the very place of the servant's work, and the machine with which it was his duty to work. It is a thing into which an employe, working about it, might fall, or inadvertently, step into. The master had provided it with the lever for the purpose of starting it into motion, or for stopping it, when necessity therefor occurred. While it was the duty of the servant to use care not to step into it, but, in assuming the risk of employment in working in the place, and in close proximity to the device, he had a right to rely upon the fact, that it was so provided, that the use of the lever, would, instantly, stop its action. Hence, the master owed the servant the duty to use care to maintain the lever, in a reasonably good state of repair, so that it would perform the functions intended. Owing this duty, the appellant was not liable to the decedent, for any damages suffered by him for his negligent stepping into the "conveyor," but he was liable for any damages suffered by the failure of the lever to stop the machine, if such failure was the result of negligence in keeping the lever in repair, and which damages would not have been suffered except for the defects in the lever.

(b) It is insisted, that a verdict should have been directed for appellant, because, it is argued, that it is a mere matter of speculation to undertake to determine, that the crushing of decedent's foot, and for which injury, the appellant is not liable, did not cause his death, but, that the additional injuries, which he suffered, because of the defective lever, did cause the death. The recovery can not be sustained, unless the defective lever was the proximate cause of the death. The proximate cause of death is the one, which causes the fatal injury. The fact, that decedent would have survived the crushing of his foot, is a fact, not impossible of demonstration by evidence. The common experience of men, teaches, that such a wound to a strong, healthy man, is not reasonably calculated to produce death. Such was the expert evi-

dence heard upon the trial. The tables of mortality are, uniformly, held, to be competent evidence of the probable duration of a life, though, an individual, whose expectancy of life is forty years, may not live a week.

One could not be excused for causing a death, by a fatal wound, because the victim was then suffering from an insignificant wound, which by reason of complications, might cause death.

The judgment is affirmed.

Reynolds v. Commonwealth.

(Decided February 25, 1919.)

Appeal from McCreary Circuit Court.

1. Homicide—Self-Defense—Instructions.—An instruction on the law of self-defense so worded as that it must have given, or was reasonably liable to give, the jury to understand, that in order to acquit the accused on that ground, they were required to believe from the evidence beyond a reasonable doubt the facts it was stated would excuse the homicide; and which, in addition, confined the exercise of the right of self-defense by the accused to the mere shooting and wounding of the deceased, was so prejudicial to the substantial rights of the accused as to compel the reversal of the judgment of conviction.
2. Homicide—Self Defense—Instructions.—The instruction should have advised the jury that their belief from the evidence of the predicated facts constituting self-defense on the part of the accused, would justify a finding from them that the killing of the deceased was excusable; as in such state of case, the shooting by the accused was justifiable whether it resulted in the mere wounding of the deceased or in his death. A form of instruction which will correctly advise the jury as to the law of self-defense, on a retrial of the case, will be found in the opinion.

HENRY C. GILLIS and I. N. STEELY for appellant.

CHARLES H. MORRIS, Attorney General, and D. M. HOWER-TON, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellant, William Reynolds, was tried in the court below under an indictment charging him with the crime of murder, the person killed being Fount Edwards. The jury, by their verdict, found appellant

guilty of voluntary manslaughter and fixed his punishment at confinement in the penitentiary five years. He was refused a new trial and has appealed. Appellant is a "mine boss," twenty-nine years of age, and in addition to a wife and two children, he had living with him a sister and brother, both in his care; the sister, Minnie, being eighteen and the brother, Herbert, sixteen years of age.

On the night of the homicide appellant, his wife, sister and brother went to a nearby church and on the way were joined by Fount Edwards, who walked in front with the two ladies, appellant and his brother following in the rear. Upon reaching the church Edwards sat with the choir and assisted in the singing. During the service appellant told his wife to tell his sister not to permit Edwards to return home with her. The sister was so advised and when the services closed declined to be escorted to her home by Edwards, telling him of appellant's request. Edwards had been visiting the sister several months and there had been no ill will between Edwards and appellant; but the latter's brother, Herbert, disliked Edwards and seemed to object to his attentions to his sister, Minnie, and it was for these reasons and the fact that Herbert, at the time, was under the influence of intoxicants, that appellant advised his sister to refuse Edwards' company in returning home, as he feared Herbert would get into a difficulty with Edwards. Upon leaving the church appellant, his wife, sister and brother walked together toward their residence, but shortly after starting were passed by Edwards, who stopped, after doing so, in a store, where he remained until the store was passed by appellant and his family; whereupon Edwards left the store and, with his brother, Fogg Edwards, the latter's wife and one or two persons, followed and soon overtook appellant and upon reaching him, laid his left hand on his shoulder and jerked him around facing him with such force as to cause his hat to fall off. Edwards, holding in his right hand a pistol, elevated on a line with appellant's face, said to him: "Why have you treated me so?" and commanded him to take his hands from his pockets. At this juncture appellant, fearing, as he claimed, immediate death at the hands of Edwards, drew his pistol and shot at Edwards five times, three of the shots striking him and causing his death.

There is little contrariety of evidence as to the facts so far stated. Some of the witnesses present claimed that they did not see the jerking of appellant by Edwards or the pistol in the latter's hands, but a majority of them did, and all said they heard his statements to Edwards as above related; some saying his manner was violent and others that it was not. While there was much in this evidence to give a basis for appellant's claim of having shot Edwards in self-defense, it was not so conclusive of that fact as to authorize a directed verdict of acquittal; hence we do not agree with appellant that this should have been done. There being on some points a conflict of evidence as to the facts of the killing, this was sufficient to take the case to the jury that they might determine appellant's guilt or innocence.

Consideration of the numerous grounds urged by the appellant for the reversal of the judgment of conviction, has enabled us to find but one among them we think sufficient to entitle him to the relief sought by the appeal, viz.: the error complained of as appearing in the instruction, given the jury by the trial court, explanatory of the law of self-defense. The instruction, numbered "4" in the bill of exceptions, is as follows:

"Although you may believe from the evidence, beyond a reasonable doubt, that the defendant, Wm. Reynolds, shot with pistol loaded with powder, leaden ball and other hard and explosive substances, the deceased, Fount Edwards, and from which shooting and wounding he then and there presently died, yet if at the time he did so he, the said Reynolds, believed and had reasonable grounds to believe, that he was then and there in danger of death or the infliction of some great bodily harm at the hands of said Edwards and that it was necessary, or was believed by the defendant, in the exercise of a reasonable judgment, to be necessary, to so shoot and wound the deceased in order to avert that danger, real or to the defendant reasonably apparent, then you ought to acquit the defendant upon the ground of self-defense and apparent necessity therefor."

There are two errors in this instruction, and if it could reasonably be claimed that neither of them singly would have made the instruction prejudicial, it is manifest that together they so fatally affected its meaning as to make it extremely prejudicial; so much so indeed,

as to furnish reasonable grounds for the claim advanced by the appellant that it impaired his right to a fair trial. The first error in the instruction is found in its apparent requirement that, in order to acquit the appellant on the ground of self-defense, the jury must have believed from the evidence, beyond a reasonable doubt, the truth of the facts upon which the instruction predicated his right to shoot the deceased; whereas the law only required that the jury believe from the evidence the truth of those facts. The instruction, as did others in the case, correctly told the jury that the killing of deceased by appellant had to be proved by the evidence beyond a reasonable doubt, but its failure to advise them that in order to acquit him on the ground of self-defense it was only necessary that they believe from the evidence the facts upon which it predicated his right to act in self-defense, was an inducement to the jury to infer that they could not acquit appellant on that ground, unless and until the facts authorizing his exercise of the right of self-defense had been proven by the evidence beyond a reasonable doubt. If it is not the meaning of the instruction that appellant's claim of self-defense must be established by the evidence beyond a reasonable doubt, then it wholly failed to advise the jury how they were to determine the existence or non-existence of the fact; whether from the evidence beyond a reasonable doubt, from the preponderance of the evidence or from the evidence at all. The best that can be said of the instruction is that it can be construed so as not to carry the requirement of belief beyond a reasonable doubt to the facts necessary to establish the defense relied on. A lawyer or judge, familiar with the law, might so understand and construe it, but the average jury can not be expected to be so discriminating. Being unfamiliar with the law it may well be doubted that they would be able to determine where the requirement as to reasonable doubt ceased to apply. But suppose the jury actually discovered that it only applied down as far as the word "yet," how were they to know by what to be governed from there on? At best they were left to conjecture. They may or may not have guessed right, but the possibility is just as great, if not greater, that the jury did not construe the instruction correctly as that they did; and manifestly a man who is being tried for his life or liberty, has a right to an instruction on his sole defense

which is not susceptible of misconstruction and which does not require the jury, in order to be right, to speculate as to whether they think the instruction requires them to believe the defense beyond a reasonable doubt from the evidence, or to believe it from the evidence which preponderates, or whether they must arrive at their verdict from the evidence at all.

We have frequently held that it is error of a reversible character for an instruction to require a jury to believe from the evidence beyond a reasonable doubt the facts necessary to authorize an acquittal on the ground of self-defense. Among the more recent cases so holding are *Toliver v. Comlth.*, 161 Ky. 81; *Biggs v. Comlth.*, 159 Ky. 836. We are aware that in *Mullins v. Comlth.*, 32 R. 1268, the opinion not reported, we refused to reverse the judgment of conviction on account of an instruction containing the same error we are here considering; the opinion, however, condemned the instruction because of the error, but affirmed the judgment on the ground that as there was no evidence to support his plea of self-defense, the appellant was prejudiced in no substantial right by the giving of the erroneous instruction. In the instant case there was, as we have seen, much evidence to support the appellant's defense of a justifiable killing. It is apparent therefore that the difference in the facts differentiates the instant case from that of *Mullins v. Comlth.*, *supra*.

The second error in instruction "4" lies in its limiting the appellant's exercise of the right of self-defense to the shooting and wounding of the deceased; whereas, it was his right to kill him, if the facts predicated in the instruction were believed by the jury, from the evidence, to exist. In other words, the instruction, in effect, told the jury that appellant, in the exercise of the right of self-defense, was authorized to shoot and wound, but not to kill the deceased. An instruction containing the same error was condemned in *Barker v. Comlth.*, 159 Ky. 309, with respect to which it is in the opinion said:

"Furthermore, upon another trial, the fifth instruction, instead of permitting Barker to shoot and wound Eason under the facts therein predicated, should follow the usual language of such instruction which permits the defendant to shoot and kill his opponent under the circumstances predicated in the instruction."

On another trial the circuit court, in lieu of instruction "4" in its present form, will give the following instruction, numbered as the other:

"Although you may believe from the evidence beyond a reasonable doubt that the defendant, Wm. Reynolds, shot with a pistol, loaded with powder, leaden balls, or other hard and explosive substances, the deceased, Fount Edwards, from which shooting the said Edwards did then and there presently die, yet if you further believe from the evidence that at the time he did so shoot and kill said Edwards, he, the defendant Reynolds, believed and had reasonable grounds to believe that he was then and there in imminent danger of death or the infliction of some great bodily harm at the hands of the said Edwards, and that it was necessary, or was believed by the defendant Reynolds, in the exercise of a reasonable judgment, to be necessary, to shoot and wound or kill the said Edwards to avert that danger, real or to the defendant reasonably apparent, then you ought to acquit him on the ground of self-defense or apparent necessity therefor."

Our examination of the remaining instructions convinces us that they correctly gave the law in its several features intended to be covered by them, respectively.

We have also considered the appellant's complaint respecting the admission and exclusion of certain evidence, but in our opinion it possesses little merit. There were a few errors of the character complained of, but none of them of such a nature as to prejudice the substantial rights of the appellant.

The same is true of other complaints made of certain rulings of the court during the trial; we find none of these rulings prejudicial. But because of the errors contained in the instruction respecting the law of self-defense, we are not satisfied that appellant had a fair trial in the court below; hence the judgment of conviction is reversed and cause remanded for a new trial and such other proceedings as may not be inconsistent with the opinion.

Fulton v. Teager, et al.

(Decided February 25, 1919.)

Appeal from Fleming Circuit Court.

1. **Deeds—Defeasible Fee.**—A defeasible fee, is a vested estate and may be sold and conveyed, and the title will be good in the vendee, unless the event occurs, which defeats the estate, in which event, the title fails.
2. **Deeds—Remainders.**—If the owner of a remainder interest, is capacitated to enter into the possession, as soon as the life estate, upon which it is limited, ends, it is a vested remainder, and the owner may sell and convey it, and pass a good title, as he is the owner of the fee, subject only to the life estate.
3. **Deeds—Defeasible Fee—Contingent Remainders—Executory Devise.**—A contingent remainder can not be limited upon a defeasible fee, but, a contingent interest may be limited upon such a fee, by a will, and it constitutes a valid estate, but, it is not a remainder, but an executory devise.
4. **Deeds—Contingent Interest.**—A contingent interest in lands, created by an executory devise, may be sold and conveyed by deed, or it may be devised by will.
5. **Deeds—Contingent Interest.**—A contingent interest, in lands, created by an executory devise, may be conveyed, where the person to whom the interest is to pass, if the contingency happens, is fixed and certain, and the uncertainty making it a contingent interest arises only from the uncertainty of the event, upon which the interest will vest, and such a contingent interest, when conveyed, will vest in the vendee, when the event, upon which it depends, occurs, or it will pass, by inheritance, to the heirs of the one to whom it is to pass, if such one is dead, when the event occurs, upon which the interest will vest.

C. W. FULTON for appellant.

JOHN P. MCCARTNEY for appellees.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

The appellees, Emma Irene Teager, Emma Louise Stealey and J. Stealey Teager, by this action, sought to compel the appellant, C. W. Fulton, to, specifically, perform a contract, in writing, which they had entered into with him, for the sale of a house and grounds. He refused to accept a deed tendered to him or to pay the price, which he had agreed to pay for the land, insisting, that the appellees were not able to convey, to him, a good title for the property. The circuit court sustained

the contentions of the appellees and adjudged, that the deed tendered, conveyed, to appellant, a good legal title, and that he should pay, to appellees, the price promised for the conveyance to him of the property, and he has appealed.

The decision, requires a construction of the last will and testament of M. M. Teager, under which the appellees claim title to the property. The clauses of the will, which bear upon the questions, for decisions, are as follows:

"2nd. I bequeath to my wife, Emma Irene Teager, all of my real and personal estate, to have and to hold, in her own right, during her natural life, and at her death, to go, in remainder, to my son, J. Stealey Teager, and my niece, Emma Louise Stealey, equally, share and share alike to be enjoyed and disposed of as they may mutually agree. . . .

"3rd. In the event of the death of the niece, Emma Louise Stealey, unmarried and without a child or children, living, prior to that of my said wife, it is my will, that her share, shall revert to my said wife during her natural life, with remainder to my son, J. Stealey Teager."

The contract provided for a conveyance of the property to appellant, by the appellees, by the execution and delivery of a deed containing covenants of general warranty, as to the title.

The second clause of the will devises to Emma Irene Teager, a life estate, in the house and grounds, and no question is made of her ability to convey a good title to her interest in it. In the second clause, the remainder in one-half of the house and grounds, is devised to J. Stealey Teager. The remainder interest, in the one-half, devised to J. Stealey Teager, by the second clause of the will, is not modified nor qualified, in any way, by any other clause or provision of the will. He has the right to take possession of one-half of the property, immediately, upon the termination of the life estate held in it by Emma Irene Teager. The death of the life tenant, is an event, which is certain to occur. There is nothing, which can prevent, the enjoyment by possession of the moiety, devised to him, immediately, upon the death of the life tenant, except his death before the termination of the life estate. There is, by the terms of the will, no postponement of any right, in the undivided one-half of

the property, devised to him, by the second clause of the will, except the possession, which was postponed until the death of the life tenant. Such an estate is one, which vested, in interest, in him, as soon as the will of the testator became effective. The owner of such an estate, being the owner of the property, in fee, subject only, to the life estate of another, may sell and convey it, and pass a legal title to it, subject to the life estate, only. *White v. Clark Nat. Bank*, 22 K. L. R. 932; *Moore v. Offutt*, 94 Ky. 568; *Phillips v. Thomas*, etc., 94 Ky. 545; *Brown v. Ferrill*, 83 Ky. 417; *Mercantile Bank v. Ballard*, 83 Ky. 481; *Railey v. Milan*, 9 R. 409, and many others.

By the second clause of the will, the remainder interest in half of the property, is devised to Emma Louise Stealey. The third clause, provides, that, if she shall die, unmarried and without a child or children then living, before the death of the life tenant, the share devised to her (Emma Louise) shall revert to the life tenant during her life, with remainder to J. Stealey Teager. The latter clause gives nothing to the life tenant, because, by the second clause, a life estate, in all the property, is given to her. The clause really provides only, that in the event of the death of Emma Louise Stealey, unmarried, and without a child or children then living, before the death of the life tenant, that the one-half of the remainder of the estate, which was devised to her (Emma Louise) by the second clause of the will, was devised over to J. Stealey Teager. The question then arises, as to what character of estate has Emma Louise, and what ability has she to convey a good legal title to it? By the second clause of the will, the remainder, in one-half of the property, is expressly, devised to her. She is yet living, and if the life estate should terminate, she is capable of becoming, at once, vested with the possession. The termination of the life estate, by the death of the life tenant, is a certain event, in course of time. There is nothing to prevent her investment with the possession, except her death during the continuance of the life estate. The law favors vested estates, rather than those, which depend upon contingencies. Hence, her estate is a fee. It is a vested remainder, but, subject to be defeated, by her death, unmarried, and without a child or children then living, before the death of the life tenant. *Johnson v. Whitcomb*, 166 Ky. 673; *Mercantile*

Bank v. Ballard, 92 Ky. 641; Robb's Guardian v. Orm's Extr., 164 Ky. 752; Wills v. Wills, 85 Ky. 486; McCoy v. Ferguson, 164 Ky. 136; Hinkle v. Hinkle, 168 Ky. 286; Fox v. Vanfleet, 160 Ky. 796; Pearcy v. Greenwell, 80 Ky. 616. She can sell and convey the interest in the property devised to her by the will, and make a good title thereto, and the title to the moiety, would remain good in the vendee, unless she should die, without a child then living, during the continuance of the life estate, but, in that event, the title would fail, so far as it rests upon the title conveyed by Emma Louise Stealey. If she should outlive the life tenant, or if she should die prior to the death of the life tenant, but, have a child or children then living, the title to the moiety of the property devised to her, would remain good in the vendee, as the contingent interest devised to J. Stealey Teager, in the third clause of the will would thereby, be defeated, because it would be impossible for it to ever vest, either in interest or possession.

The third clause of the will gives to J. Stealey Teager, an interest in the one-half of the remainder devised to Emma Louise Stealey, by the second clause, and the question presented, is whether such an interest is alienable, and if so, will such interest pass to the vendee, by the deed of J. Stealey Teager, in a way to convey a legal title to the moiety, in which Emma Louise Stealey has, at the present, a defeasible fee in remainder, in the event, that her estate should be defeated, by her death, without a child then living, in the lifetime of the life tenant. The interest devised to J. Stealey Teager by the third clause of the will, is a contingent one, and dependent upon the contingency of the death of Emma Louise Stealey, without a child or children then living, before the death of the life tenant. His interest, however, is not a contingent remainder. A remainder can not be limited upon a fee, because it would be the creation of an estate in derogation of the fee, and this ancient doctrine of the common law, yet, prevails, although the fee should be a qualified one, or a conditional or base fee, as is a defeasible fee. The interest devised to J. Stealey Teager, in the portion of the property, which was devised to Emma Louise Stealey, in remainder, has all the elements of a contingent remainder, except that it is a contingent estate limited upon the defeasible fee of Emma Louise Stealey, which by the common law, is an

impossibility. It is, however, an interest in the land, and is of that character of estates, which have grown up under the statute of uses and the statute of wills, and now, well recognized, and which, if created by a deed, would be denominated an estate upon a conditional limitation, and when created by a will, as was this one, is called an executory devise. Such an estate can be limited upon a defeasible fee, by a will, and is a valid estate. *Hart v. Thompson*, 3 B. M. 482; *Sale v. Crutchfield*, 8 Rush 636; *Daniel v. Thompson*, 14 B. M. 533; *Murphy v. Murphy*, 183 Ky. 731.

Section 2341 Ky. Stats. provides, that, "any interest in, or claim to real estate, may be disposed of, by deed or will, in writing." The terms of this statute seem to have effectually closed all discussion, as to whether a contingent interest, created by will, in the nature of an executory devise, in lands, can be the subject of sale and conveyance, and remove all the difficulties, which arise from distinctions, theretofore, drawn between estates, which were subject to alienation and those, which could not be alienated. *Nutter v. Russell*, 3 Met. 146. Hence, any kind of an interest in lands, may be subject to alienation, contingent remainders, executory devises, conditional limitations, as well as vested interests. While at the common law, a contingent remainder, before the contingency happened, upon which the remainder was to vest, could not be transferred at law, but it might be assigned, in equity. If attempted to be transferred at law, it could be made effective in no way, except by the common law procedure of fine or common recovery, which constituted an estoppel, but, since the enactment of the above statute, a contingent remainder is held to be a thing of vendible value and may be subjected for the owner's debts, and under the express terms of the statute, is the subject of alienation by deed or will. *People's Trust Co. v. Deweese*, 143 Ky. 730; *McAlister v. Ohio Valley Banking Co.*, 114 Ky. 540; *White v. White*, 86 Ky. 602; *Davis v. Wilson*, 115 Ky. 639; *Grayson v. Taylor*, 80 Ky. 358; *Jacob v. Howard*, 15 R. 133. The contingent interest of J. Stealey Teager in the portion of the remainder, in which Emma Louise Stealey, was devised a defeasible fee, being an interest in real estate, may be sold and conveyed by deed. As to what the purchaser, of a contingent remainder or a contingent interest created by an executory devise, would

receive, however, will depend upon the terms and conditions upon which the interest was created, by the instrument of its creation, and in whom the contingent estate, vests, when the contingency occurs, which causes it to vest. *Leppes v. Lee*, 92 Ky. 16. If the instrument should provide, that upon the happening of the event, upon which the contingency vested, the property should go to a designated one, if then living, but, if not living, then to another, the purchaser of such contingent interest, would be defeated, in the enjoyment of the property, by the death of his vendor before the happening of the contingency, his death prior thereto working a defeasance of the interest.

If, however, in the instant case, Emma Louise Stealey, should die, without having a child then living, before the death of the life tenant, the contingent interest of J. Stealey Teager, would then, become a vested one, because there would be nothing, which would incapacitate him from taking the possession, in case of the death of the life tenant, and having therefore conveyed his contingent interest, by joining in a deed, by which the entire property purported to be conveyed, with covenants of general warranty, there could be no doubt, but, what his deed, theretofore made, would estop him from claiming any interest in the property, and from denying the title of his vendee to it, and his heirs would, likewise, be estopped, since they could only claim by inheritance from him and not as devisees under the will. *Massie v. Sabastin*, 4 Bibb 433; *McIllvaine v. Porter*, 9 K. L. R. 899; *Churchill v. Ferrill*, 1 Bush 54; *Fitzhugh v. Tyler*, 9 B. M. 559; *Griffith v. Dicken*, 4 Dana 561; *Logan v. Steele*, 4 T. B. M. 430; *Hutcherson v. Coleman*, 2 J. J. M. 244; *Smith v. Mahan*, 7 T. B. M. 228; *Bohan v. Bohan*, 78 Ky. 408; *Nunnally v. White*, 3 Met. 584; *Perkins v. Coleman*, 90 Ky. 611; 16 Cyc. 689. The sufficiency of the title does not, however, rest, altogether, upon the doctrine of estoppel but will rest upon the conveyance of the contingent interest, as will be, hereafter, shown.

The following situation, which might arise, is suggested: if J. Stealey Teager, after having conveyed his entire interest in the property, including the contingent interest, by a deed, with covenants of general warranty, should die, during the continuance of the life estate, and while Emma Louise Stealey was yet alive, and there-

after, the latter should die, without a child then living, before the termination of the life estate, in whom would the contingent interest then vest? Would the contingent interest vest in the vendee, by reason of the conveyance of it to him, or would it, under the terms of the will—the instrument, which created it—pass to, and vest in another person or revert to the heirs of the testator? It will be observed, that the contingent interest is devised to J. Stealey Teager. There is no devise over, in the event of his death, before the contingency upon which the interest would become vested. There is no provision of the will, which under any circumstances, provides, for the contingent interest going to any other person. The uncertainty, which makes the interest a contingent one, is not an uncertainty as to who is to have the remainder, if the contingency happens. That is definitely and conclusively fixed by the will. The thing, which makes the contingency, is the uncertainty, as to whether the event will happen, upon which the interest will vest. Such a contingent interest as this, is more than a mere possibility or expectancy, but is a possibility coupled with an interest, and may be conveyed in the absence of such a statute, as section 2341, *supra*. Such an interest conveyed, passes to the vendee, all the rights in the contingent interest, which the vendor would have had, if living at the time of the happening of the contingency, upon which the interest would vest, and upon the happening of the contingency, the interest would vest in, and pass to the vendee. If there was anything in the terms or conditions of the devise of the contingent interest, which would defeat its vesting in the devisee, at the happening of the contingency, as a matter of course, it would not vest in his vendee, but, in the instant case, there is nothing, which could prevent the vesting of the interest in the devisee, upon the happening of the contingency, if he is then living, and if not alive at that time, it will pass to and vest in his heirs, not under the will, but by inheritance, if he had not disposed of it theretofore, by deed or will. The declaration, that the contingent interest created, in the instant case, would, if the devisee had not conveyed it in his lifetime, or devised it by will, have passed, by inheritance, to his heirs, may be challenged. It is true, that the clause of the will, which created the contingent interest, in the devisee, does not accompany the gift with any words of inheri-

tance, but section 2342, Ky. Stats. provides, that "unless a different purpose appears by express words or necessary inference, every estate in land, created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of." The interest being one, which would have descended to the heirs of the devisee, by inheritance, in the event of his death, it would, unquestionably, vest in the vendee of the devisee, when the event occurred, upon the happening of which the interest vested, the devisee having conveyed it to another.

It appearing, that the deed with covenants of general warranty tendered, will convey to appellant a good title to the property, the judgment is therefore affirmed.

Bright v. Supreme Council of Catholic Knights and Ladies of America, et al.

(Decided February 25, 1919.)

Appeal from Graves Circuit Court.

1. **Insurance—Fraternal Insurance—Beneficiaries.**—Previous to the enactment of the act of March 22, 1916, where the beneficiary in a policy of insurance issued by a fraternal benefit society, died, during the lifetime of the insured, and the insured did not, thereafter, make any further or other disposition of the fund to be paid under the policy, and in the absence of anything, in the contract of insurance, which made any other disposition of the fund, then to the beneficiary named, the fund, upon the death of the insured, descended to the heirs of the deceased beneficiary.
2. **Insurance—Fraternal Insurance—By-law.**—Previous to the act of March 22, 1916, concerning fraternal insurance companies, the constitution of the company, the laws of the state and the terms of the contract, fixed the rights of the parties and determined the disposition of the insurance fund, to be paid under the policy, at the time of the making of the contract of insurance, and after the contract of insurance was made, neither a by-law of the society, nor an act of the General Assembly can divest one of a vested right, which he acquired under the policy.
3. **Insurance—Fraternal Insurance—Beneficiaries.**—As a general rule, a beneficiary of a certificate in a fraternal benefit society, has only a contingent interest, which does not become vested until the death of the insured, and if he dies, before the insured, his right dies with him, and such is the rule declared by the act of March 22, 1916, to hereafter prevail in this state, but, here-

tofore, by the terms of sections 4841 and 655 Ky. Stats., the rule has been held to have been abrogated, and under contracts of insurance made previous to March 22, 1916, if the beneficiary died before the insured, and the insured, thereafter, made no further disposition of the fund to be paid under the certificate, and there was no provision of the contract, which provided for any other disposition of it, than to the named beneficiary, the right of the beneficiary was held to be vested, and while the insured might divest the right of the beneficiary by his act, the society could not do so.

ROBBINS & ROBBINS for appellant.

J. C. SPEIGHT, T. J. MURPHY and W. S. FOY for appellees.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

On the 19th day of May, 1905, Valentine E. Bright, obtained a policy of insurance or benefit certificate, which was issued to him, upon his application, by the Supreme Council of the Catholic Knights and Ladies of America. The insurer, is a fraternal society, under the supervision of a grand or supreme body, and secures its membership through the lodge system, exclusively, and does not pay commissions, nor employ agents, "except in the organization and supervision of the work of local or subordinate lodges or councils." The beneficiaries named in the certificate, were the three children of the insured, the appellant, Joseph A. Bright, Odella Bright, later Heathcote, the mother of the appellees, and Robert E. Bright. By the terms of the certificate, the benefit, was to be paid to the three beneficiaries, equally, after the death of the insured. The benefit, was the sum of \$2,000.00. The conditions, under which the society agreed to pay the benefit, and the persons to whom it was to be paid, are set out, in the policy, as follows: "Upon condition, that the statements by him, made in his application for membership in said branch, the representations and agreements made and subscribed to, by him, in the medical examiner's blank, and the answers given and certified by him, to the medical examiner, all of which representations, agreements, statements, and answers, are, hereby declared to be warranties, and are made a part of this contract, and upon condition, that the said member complies, in the future, with all laws, rules and regulations now governing the said branch or order, or that may hereafter, be enacted by the

supreme council, to govern said branch or order, all of which, are, also, made a part of this contract. These conditions, being assented to, and complied with, the Supreme Council Catholic Knights and Ladies of America, hereby, promises and binds itself to pay out of the widows' and orphans' benefit fund, to his children, Joseph A., Odella, and Robert E. Bright, equally, the sum of two thousand dollars, in accordance with, and under the provisions of the laws, governing said fund, upon satisfactory proof of the death of said member, and, upon surrender of this certificate, provided, that said member is in good standing in this order, at the time of his death and provided, also, that this certificate shall not have been surrendered by said member, and another certificate issued at his request in accordance with the laws of this order." The widows' and orphans' benefit fund, is created by a levy of assessments upon the members of the order, by the laws and regulations prescribed by the supreme council.

The insured, died on the 4th day of October, 1917, but, preceding his death, his daughter, Odella Heathcote, died on January 21, 1910, leaving three children surviving her, and his son, Robert E. Bright, died on October 10, 1912, leaving no children. On April 21, 1911, the insured executed a last will and testament, by which he devised to the children of Odella Heathcote, one-third of the sum to be derived from the benefit certificate, and to each of his two sons, one-third of it.

There was a provision of the constitution and by-laws of the society, and which was in force, previous to, and at the time of the death of the insured, and which provided, that if a member desired to change the beneficiary in the certificate, held by him, that he should give written notice, and surrender his certificate, with the designation of the person to whom he desired a new certificate to be issued, in which instance, the old certificate would be cancelled, and a new one issued to the member instead, payable to the desired beneficiary, if not contrary to the laws of the order. The insured, never made any attempt, nor expressed any desire to have the certificate changed, so as to designate other or different beneficiaries, from the ones, originally named.

By another by-law of the society, it was provided, that no entry should be made in any application, or in any certificate, by which a member should be permitted

to designate a beneficiary, by reference, to any will of the member, or the amount or share of any beneficiary, and that no will should be permitted to control or affect the apportionment or distribution of, or rights of any person, to any benefits payable by the order, and neither, should any member be permitted to designate his "estate" as the beneficiary, and in the event, no person or persons, "are entitled to the benefit, it shall revert to the benefit fund."

During the lifetime of the insured, but, subsequent to the repeal of section 679 Ky. Stat. to the extent, that its provisions affected a fraternal society, such as the insurer, in the present instance, the constitution and by-laws, of the society, were changed, so that they provide, that the death benefits, to be paid by the society, shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member, and in certain instances to a charitable institution, upon which the member is dependent. Another clause of the by-law, is to the effect, that "In case of the death of one or more of the beneficiaries, before the death of the member, the amount of the certificate or policy, shall be paid to the survivor or surviving beneficiaries." A further provision is to the effect, that, "If the law of the state, where the member resides, or the branch is located, is more limited or circumscribed or more liberal than the charter of the order as to persons or classes, or subjects allowed to have the benefits of fraternal insurance money, then the law of the state, where the insured member resides or the branch is located shall be observed."

This action was instituted by Joseph A. Bright, who sought to recover the entire amount of the benefit certificate, as being the only surviving beneficiary named, in the certificate. The supreme council, the insurer, deposited the amount of the benefit, in court, and had no further interest in the controversy. The appellees, the three children of Odella Bright, or Heathcote, claim one-half of the benefits, as the heirs of their mother and uncle, Robert E. Bright. The court, sustaining a general demurrer to the reply, as amended, of Joseph A. Bright, rendered a judgment, directing one-half of the benefit, to be paid to the children of Odella Heathcote, and the other half, to Joseph A. Bright, and from that

judgment, he has appealed. The theory, upon which the appellant bases his claim to the entire benefit, is, that he was the only beneficiary, who was named in the certificate, surviving, at the death of the insured, and that the by-law of the society, which provides, that, in the event of the deaths of one or more of the designated beneficiaries, during the lifetime of the insured, the entire benefit should be paid to the surviving beneficiary or beneficiaries, is binding upon the insured, and the beneficiaries, although it became the law of the society long after the certificate was granted to him, and after the death of the other two beneficiaries; that the beneficiaries' interest, was a mere expectancy, and did not vest, until the death of the insured, and hence, the by-law, was not an impairment of the contract of insurance, between the society and the insured, nor between it and the beneficiaries.

It may be conceded, that every contract of insurance entered into between a beneficial society, and a member, is made in contemplation of its constitution and by-laws, its articles of association, and the statutes of the state applying to the operation of such societies, and all of these enter into and form a part of the contract of insurance, which is evidenced by the benefit certificate, and the members are bound by the provisions of the constitution and by-laws, although, they may not have actual knowledge of them, and it may, also, be conceded, that alterations in the by-laws and constitution of the society, are binding on the society, its members and the beneficiaries of its insurance, if the alterations are intended to operate, retrospectively, and the society has reserved the right to make the changes, in its by-laws, or where in the contract of insurance, the insured agrees to be bound by alterations, thereafter, made. Such alterations, however, can not be made, as to past contracts, if the alterations would destroy vested rights, or in other words, would impair the obligations of the contracts. If the contract contained a provision, that any alteration, thereafter made in a by-law, should be binding upon the parties and affect the terms of the contract, it would become, upon its enactment, a part of the contract, if it was such a by-law, as the society was authorized to make, and apply to the particular contract. It will be observed, in the instant case, that the by-law, if any, which existed, at the time of the making of the contract, with reference to whom, a benefit was to be

paid, in the event of the death of one or more of the beneficiaries, in the lifetime of the insured, is not made a part of the record, and neither is the application of the insured. Hence, we are confined to a consideration of the benefit certificate, and the statute laws of the state applicable to such subject, in determining what was the contract between the parties, at the time of its making and the rights of the parties under it, at that time. It is not clear from the terms of the certificate, that the insured agreed, that a by-law might be made, by which his choice of a beneficiary of his certificate might be changed and without his consent, should become a part of his contract, and be binding upon him and the beneficiaries, whom he had selected. The insured agreed in the contract, "to comply with all laws, rules and regulations now governing the said branch or order, or that, may, hereafter, be enacted by the supreme council, to govern said branch or order, all of which are, also, made a part of this contract." It does not seem, that this stipulation could have reference to a by-law, prescribing to whom the benefits of the certificates were to be paid after the death of the deceased, as that, was a matter, with which he had no duty to perform, and was a duty, which the society could, alone, perform. The certificate, also, provides, that the society will pay out of the widows and orphans' benefit fund, to his children, Joseph A., Odella and Robert E. Bright, equally, the sum of two thousand dollars, in accordance with, and under the laws, governing said fund, upon satisfactory proof, etc." The by-law, under which appellant claims the entire benefit, limits its payment to certain classes, which do not include heirs of a deceased beneficiary, but, further, provides that, if the law of the state, where the branch resides, is more liberal, as to classes, or subjects to which the benefits may be paid, the laws of the state shall govern the fund in that respect. The law of this state, at the time, the contract was made, was to the effect, that if a named beneficiary should die, during the lifetime of the insured, and the latter, never made any other or further disposition of the fund, that it should go to the heirs of the deceased beneficiary, in the absence of anything in the contract, which provided for a different disposition of it, in such a state of case. The parties contracted, in contemplation of such being the law. The insured evidently, relied upon that being the manner, in which the fund should be disposed of in the event of his death,

as he undertook to dispose of it by will, in accordance with such law, as to its disposition. The question then arises, as to whether the society had the authority to enact a by-law, many years, after the contract was made, changing the beneficiaries, in the certificate, and, thereby, changing the contract, as made. The society might, undoubtedly, make the by-law, but, would it be retrospective in its operation, and affect contracts, which had been made before its adoption? There is nothing about the by-law which was made, in 1916, which indicates, that it was intended to be retrospective, in its operation. Further, although it should be conceded, that the by-law, thus made, would affect the insured, and his rights and duties as a policyholder, in the order, would it affect the rights of the beneficiaries named in the certificate, if any they had?

The holder of a benefit certificate, in a fraternal benefit society, may give it up and release the society from its contract or he may nullify the contract, by failing to be in good standing in the society, and one of the articles of the constitution and by-laws shown in the pleadings, which it may be assumed was in force, when the certificate was granted, provides how, and in what manner, the insured might have changed the beneficiaries named in his certificate by surrendering it, and obtaining a new certificate, with other beneficiaries designated; and that he could thus defeat the claim of a beneficiary named in the first certificate, there is no doubt, but, he never did or attempted to do that. It may be conceded, that the weight of authority, is to the effect, that before the death of the insured, the right of the beneficiary, in a benefit certificate granted by such a society, as the one, under consideration, is merely contingent, and that it, only, becomes vested, upon the death of the insured, and, if the beneficiary named, dies before the insured, his right ceases with his death, and hence, a beneficiary can not, during the life of the insured, complain of an alteration by a society, of its laws. 20 Cyc. 78; 157.

Such has been declared to be the law of this state, by the act of March 22, 1916. Previous to the enactment of that statute, however, and at the time, the contract, in controversy, was made, a different rule, as heretofore stated, prevailed, and the validity of that rule was rested upon the statute laws of this state, which it was said abrogated the general rule, above stated, in a state of case, where the beneficiaries named in the certificate,

died before the death of the insured and the insured, thereafter made no other disposition of the fund to be paid under the certificate, and the contract of insurance contained no provision, providing for a disposition other than the one, provided for, to the named beneficiary or beneficiaries in the event of the death of the beneficiary before the insured's death. In this state of case, the policy was construed to be a testamentary paper, and the fund was adjudged to go, according to the rule applicable to wills, as provided for in section 4841, Ky. Stats. According to such construction, the fund descended to the heirs and distributees of the deceased beneficiary. *Buckler v. Supreme Council Catholic Knights*, 143 Ky. 618; *Hall v. Ayer's Guardian*, 32 R. 291; *Neal's Admr. v. Shirley's Admr.*, 137 Ky. 818; *Supreme Council, etc. v. Densford*, 21 R. 1564; *Finn v. E. H. of Columbia Woodmen*, 163 Ky. 189; *Vaughn's Admr. v. Modern Brotherhood*, 149 Ky. 588.

The exact question involved, here, was considered and determined, in *Buckler v. Supreme Council, etc., supra*. In that case, the designated beneficiary died, intestate, and without children surviving, during the life of the insured. The insured never named another beneficiary. After the death of the insured, a contest arose between his heirs, and those of the mother of the beneficiary, over the proper distribution of the fund. At the time the certificate was issued, the by-law of the society provided, that if all the beneficiaries should die in the lifetime of the member, and he should make no other or further disposition of it, it should be paid to the heirs of the insured. Previous to the death of the insured, the by-law had been changed, so as to provide, that in the event of the death of the beneficiary, in the lifetime of the insured, and the insured, should make no other or further disposition of the benefit, it should be paid to the direct heirs of the beneficiary. The court held, that notwithstanding, the alteration of the by-laws, since the making of the contract, and by which the beneficiaries were changed, in the event of the death of the beneficiary, and the failure of the insured to make a further disposition of it, the fund should be paid to the heirs of the insured in accordance with the by-law, in force at the time the policy was issued, and excluded those of the mother of the beneficiary, saying: "The constitution of the company and the laws of Kentucky, in force at the time, the policy was issued, fixed the rights of the par-

ties, and control the disposition of the fund." Construing section 655, Ky. Stats., which has application to insurance rights generally, it has been held in *Neal's Admr. v. Shirley's Admr.*, *supra*, and *Hall v. Ayer's Guardian*, *supra*, that in a state of case, similar to the facts of this case, and to those appearing in *Buckler v. Supreme Council*, etc., *supra*, the fund under the policy passed to the heirs and distributees of the deceased beneficiary, and not to the personal representatives of the insured. These opinions and the others, above cited, go to the extent of holding in effect, that under the statute laws of this state, in force at the time, the insurance contract, in controversy, was made, that where the named beneficiary died before the insured, who made no other or further disposition of the fund, and in the absence of any provision of the contract for a different disposition of the fund, in the event of the death of the beneficiary, in the lifetime of the insured, the right of the beneficiary and his heirs to the fund, was in the nature of a vested right, which might be divested by act of the insured in the manner provided by the contract and by-laws, but could not be divested by the action of the insurance company. The beneficiaries, in the instant case, were selected by the insured, as he undoubtedly had the sole right to do. He never changed them, by any act of his. If the interest and rights of the beneficiaries became fixed, by the laws in force and applicable at the time, the contract was made, the society could not divest the right by thereafter altering its by-laws. If it could do so, it could have as well excluded the surviving beneficiary, as the dead ones. Neither could the legislature, by the act of March 22, 1916, divest the vested rights acquired by persons under contracts theretofore made, although it may affect all after-made contracts. The judgment of the circuit court, being in accordance with the views herein expressed, is therefore affirmed, but damages will not be adjudged because of the supersedeas bond, executed.

Hutchison v. Ohio Valley Electric Railway Company.

(Decided February 25, 1919.)

Appeal from Boyd Circuit Court.

1. Torts—Joint Tort Feasors—How Sued.—It is a well known rule of the common law that joint tort feasors may be sued jointly

or severally at the election of the plaintiff; and that if jointly sued a trial shall be had as to all the defendants at one and the same time. The Ky. Civil Code makes no material change in this rule. So where, as in this case, the injury to the person of the plaintiff complained of results from the concurring negligence of the two defendants jointly sued, neither of them is, as a matter of right, entitled to a separate trial; nor does the fact that they severally answer, make any difference.

2. Torts—Joint Tort Feasors—Separate Trials.—It would be unwise to hold that in no state of case should one or each of several defendants jointly sued for a tort, be allowed a separate trial or trials, but safe to declare that to authorize the severance, the trial court should be convinced that it would be essential to the ends of justice, and that the facts or circumstances are of such exceptional character as to imperatively require it. But in no case will the Court of Appeals approve the action of the trial court in permitting the severance, unless it is affirmatively made to appear of record that it was properly allowed.

JOHN S. FULLERTON for appellant.

HAGER & STEWART for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellant, Edward Hutchison, instituted in the Boyd circuit court this action against the appellee, Ohio Valley Electric Railway Company, and William Hauk seeking the recovery of damages for injuries to his person caused, as averred, by their joint and concurrent negligence; it being alleged in the petition that the railway company so negligently operated one of its street cars and Hauk so negligently his jitney bus or automobile, in which appellant was at the time a passenger for hire, as to cause a collision between them on a street of the city of Ashland and thereby inflict upon appellant's body the injuries complained of. The defendants answered separately. The answer of the railway company denied the negligence attributed to it by the petition, and alleged that appellant's injuries were caused by the negligence of Hauk alone. That of Hauk also denied the negligence attributed to him by the petition and alleged that appellant's injuries were caused solely by the negligence of the railway company. All affirmative matter of each answer was controverted by reply, thereby completing the issues.

For some reason not appearing in the record, the railway company was disinclined to have the case proceed to a trial against the defendants jointly. So when

the case was called for that purpose, it requested of the court a separate trial of the issues made by the pleadings between it and appellant, and entered of record a motion to that effect, to which appellant objected. But the objection was overruled and the motion of the railway company for a separate trial sustained; to both of which rulings appellant at the time excepted. The separate trial thereupon followed, resulting in a verdict for the railway company, as directed by a peremptory instruction from the court, given at the latter's request, at the close of appellant's evidence, to which he objected and excepted. There was no trial of the action as to Hawk, the other defendant; at least it does not appear that there was from the record. We therefore assume that the case was continued as to Hawk at that term of the court. Appellant filed motion and grounds for a new trial, but the motion was overruled, to which an exception was also taken; and from the judgment entered upon the verdict and orders manifesting the several rulings excepted to, he prayed and was granted an appeal.

Appellant's chief complaint in this court is, that the action of the circuit court in granting appellee a separate trial is reversible error. The well known rule of the common law that joint tort feasons may be sued jointly or severally has not been changed by our Civil Code. On the contrary it recognizes and has adopted the rule. Civil Code, sec. 83, subsections 1, 2, 3, 4, 5 and 6; *Pickrell v. City of Louisville*, 125 Ky. 213; *Cum. T. & T. Co. v. Ware*, 115 Ky. 581. So where the injury to the person or persons is, as here alleged, the result of the concurring negligence of two or more parties, they may be sued jointly or severally. Nor does the fact that different degrees of care may be owing to the plaintiff by the different defendants, interfere with the former's right to sue them jointly or severally as he may elect. But we have never before been called on to decide upon such a state of case as is here presented, whether any one or more of several defendants jointly sued for the same tort can rightfully demand or be granted a separate trial or trials. If any one of several defendants can do so, it would seem to be equally the right of each of the others; and if there should happen to be as many as six or a dozen such defendants, the separate trials, to say nothing of the time unnecessarily consumed, would be attended with extraordinary expense to the

Commonwealth, and unsuccessful "litigants," especially the plaintiff, if defeat should fall to his lot on any considerable number of the trials.

It has long been the policy of this state and the practice of its courts as well, to prevent waste of time and unnecessary expense in disposing of litigation by trying, when practicable, several cases together. This is often done where the several causes are of the same nature, or where several actions are brought by one plaintiff against different defendants, or by different plaintiffs against the same or other defendants and the issues are the same in each case.

It has also been held that this practice is permissible even when the defendants employ different counsel. The ground upon which this practice is bottomed is that it prevents unnecessary delay and expense. The order requiring such hearing of several causes together does not have the effect of merging the several actions into one. Its only effect is that the suits be tried together. Each case retains its distinctive characteristics and the judgment in each case is several. And if the judgment in either of the cases is erroneous, such error is fatal only to that judgment and does not affect the others. *Anderson v. Sutton*, 2 Duvall, 480; *Paducah Traction v. Walker's Admr.*, etc., 169 Ky. 721; *Reid v. Nickols*, 166 Ky. 424. In each of the cases, *supra*, it was held that the question whether such cases as those of the character last referred to should be tried together, is a matter in the discretion of the trial court, and such discretion will not be interfered with on appeal unless it was clearly abused.

If the practice of trying together cases of different parties because of their involving the same or like issues, is permissible, *a fortiori* should it be followed in a case like the one before us, the only parties to which are the plaintiff who was wronged and the two defendants who, as alleged, jointly committed the wrong; the negligence of the one concurring with that of the other in inflicting it. As the law gave the former the right to sue the two latter in one and the same action, his legal right to have a trial against the two at the same time would seem necessarily to follow.

We have found but one case that can be said to afford even colorable support to the action of the circuit court in according appellee a separate trial, viz.: *Young v. Adams*, 14 B. Mon. 102. The action was one in eject-

ment brought by the plaintiff against the three defendants jointly and the answer of the latter put in issue her title to the land sued for. We gather from the opinion that two of the defendants, Knox and Taylor, claimed title to a part of the land in controversy as tenants in common, and that the third defendant, Jones, claimed title to another part of the land wholly disconnected from that claimed by Knox and Taylor; also that he had no interest whatever in the land claimed by them, nor they in the land claimed by him. The plaintiff recovered the whole of the land in the court below, but on the appeal the judgment was reversed because of error in the instructions. And while it can not be told from the opinion whether Knox and Taylor had moved for or been refused a separate trial in the court below the opinion with respect to that matter said: "It is evident that the testimony of Elijah Jones, one of the defendants, according to the principles herein settled, is material and important to his co-defendants, to enable them to sustain their defense to the plaintiff's action; the court should therefore exercise a reasonable discretion in permitting the other defendants to have him severed from them in their defense so far as to allow them to have a separate trial, that they may obtain the benefit of his testimony, if he has no interest in the land in their possession, nor in the result of the suit, so far as they are concerned. But this matter must be left to the sound discretion of the circuit court, to be exercised with reference to the circumstances existing when such an application may be made and in such manner as will tend to promote the justice of the case, and not otherwise."

It should be borne in mind that at the time the case, *supra*, was decided the common law on the subject of evidence obtained in this state, which prevented, not only the parties to an action from testifying in their own behalf, but also all other persons having an interest in the subject matter of the action from doing so. This rule of evidence being in the minds of the court, doubtless led to the expression from the writer of the opinion to the effect that upon the return of the case to the circuit court, that court upon ascertaining that the defendant, Jones, had no interest in the land claimed by his co-defendants, Knox and Taylor, might, in the exercise of a sound discretion, allow Knox and Taylor a separate trial, in order to enable them to obtain the benefit of certain important evidence believed to be in the possession

of Jones and which, under the laws of evidence then in force, he would not otherwise have been competent to give. How the question whether Knox and Taylor were entitled to a separate trial would have been decided by the court, if the law of evidence now obtaining in this state had then been in force, must be left to conjecture; but certain it is, that it now removes the sole ground upon which the opinion rested their right to a separate trial.

In the older case of Dougherty, etc. v. Dorsey, 4 Bibb 207, the plaintiff Dorsey sued in a joint action the four defendants, Daugherty, etc., for malicious prosecution. One of the defendants, Dickens, by separate answer, pleaded not guilty and probable cause. The other three defendants by joint answer relied on the same grounds of defense.

When the case was called for trial the three moved the court for a separate trial on the ground that their co-defendant, Dickens, was a material witness for them to prove a probable cause for the prosecution. But their motion was overruled and a joint trial was had resulting in a verdict and judgment for the plaintiff. On the appeal the judgment was affirmed. Respecting the appellant's complaint of the circuit court's refusal to grant the separate trial to the three, answering jointly, the court in the opinion said:

"We are aware of no cause where it has been held that defendants, because they may have severed in their pleas, have at their election a right to separate trials; nor can we perceive on principle why they should have such a privilege. Cases no doubt may occur where the court would act strictly correct in permitting separate trials; but those cases must of necessity depend much on their particular circumstances; and the court in either permitting or refusing a severance, must, as in almost every other instance in the course of the preparation of a cause they do, exercise a considerable latitude of discretion.

"This discretion it is admitted should not be abused to the prejudice of either party, but exercised in reasonable and proper limits. As respects the present case, we are unable to perceive any possible injury which can have been sustained by the defendants in the court below in consequence of the refusal of the court to direct separate trials. If on a separate trial Dickens would have been a competent witness for the other defendants,

so he would on a joint trial. . . . Dickens then on a separate trial could only have been used as a witness in the absence of all proof as to his guilt in the transaction complained of in the declaration; and in the absence of such proof, even on a joint trial there is no doubt but he would, according to the settled rules of evidence, be a competent witness. The circumstances, therefore, of the court having refused separate trials can not warrant the interposition of this court in setting aside the judgment."

It is apparent from the foregoing statements of the opinion, as well as those of the opinion in *Young v. Adams*, *supra*, that, even as the law then stood, the broad discretion of the circuit court in the matter of permitting or refusing a separate trial to one or more of several joint defendants, could not be interfered with by the appellate court in the absence of a showing of its palpable abuse.

In 8 Cyc. 612 on this subject it is said: "The severance of a suit as to the parties defendant, so as to make two several suits out of one joint suit, is never allowed at the common law; but an action may be severed as to defendants by their consent. By statute in many states, however, the plaintiffs may sever under certain circumstances, as where but a part of the defendants are served, where a several judgment is proper, or where one defendant dies; but severance will not be granted merely to enable parties to testify." *Black v. Marsh*, 32 Ind. App. 53; *Melville v. Thompson*, 114 Iowa, 743.

Again on page 613 it is said: "Unless the conditions are such that severance is a strict matter of right, as where the right to a joint action is conferred by statute, the court is vested with judicial discretion to grant or refuse an application therefor; but the improper refusal of a motion for a severance is not a ground for reversal where no injury resulted to the moving party."

We do not mean to hold that in no state of case should one or more defendants jointly sued for a tort be allowed separate trials, but only to declare that to authorize the severance the trial court should be convinced that it would be essential to the ends of justice; in other words, that the facts or circumstances are of such exceptional character as to imperatively require it; and that in no case will the Court of Appeals approve the action of the trial court in permitting the severance, un-

less it is affirmatively made to appear of record that it was properly allowed.

To hold otherwise would, it seems to us, deprive the plaintiff of the right of election given him by the law to sue the joint wrongdoers jointly or severally and yet give the latter the right to elect, to their advantage in every instance, to have separate trials. In a case like the one before us we will not speculate as to the effect of the severance upon the rights of the parties. It is sufficient for us to know that the record does not affirmatively show it was authorized. Wherefore the judgment is reversed and cause remanded for a new trial consistent with the opinion. Whole court sitting.

Pritchett, et al. v. Kentucky Bank & Trust Company.

(Decided February 25, 1919.)

Appeal from Hopkins Circuit Court.

1. Bills and Notes—Validity of Assignment—What Law Governs.—The validity of the assignment of a note must be determined by the law of the state where the assignment is made.
2. Fraudulent Conveyances—Bills and Notes—Fraudulent Assignment—Evidence—Sufficiency.—In an action to set aside the assignment of a note by the payees to the wife of one of the payees, evidence examined and held to support the finding of the chancellor that the assignment was in fraud of creditors.

LEE GIBSON and J. A. JONSON for appellants.

GORDON, GORDON & MOORE and WILLIAM J. COX for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

This suit was brought by the Kentucky Bank & Trust Company against T. W. Pritchett, C. W. Pritchett, W. H. Pritchett and Martha Arnold Pritchett and others to set aside, as in fraud of creditors, the transfer of a note for \$1,750.00, executed by Martin & McKennon to W. H. Pritchett and C. W. Pritchett on January 17, 1910, and assigned by them to Martha Arnold Pritchett on February 15, 1910. The chancellor granted the relief prayed for and the defendants, T. W. Pritchett, C. W. Pritchett, W. H. Pritchett and Martha Arnold Pritchett, appeal.

The facts out of which the litigation grows are, in brief, as follows: W. H. Pritchett and C. W. Pritchett are sons of T. W. Pritchett. On August 12, 1908, they and their father executed and delivered to W. J. Rhdy, who assigned them to the Kentucky Bank & Trust Company, their three promissory notes for \$1,830.00, \$1,835.00 and \$1,835.00, due in twelve, fourteen and thirty-six months, which were secured by a mortgage on certain real estate owned by T. W. Pritchett in the city of Madisonville, Ky. A portion of this money was used to erect and equip a steam laundry plant in Chickasha, Oklahoma. The remainder of the money represented by the notes had been previously borrowed by W. H. Pritchett from W. J. Ruby.

On January 17, 1910, W. H. Pritchett and wife, Martha Arnold Pritchett, and C. W. Pritchett, sold their laundry plant, but not the real estate, to Martin & McKennon, of Chickasha, Oklahoma, for the price of \$10,500.00. Of this sum, \$7,000.00 was paid in cash, and two notes for \$1,750.00 each executed for the balance. One of these notes, which was payable in eighteen months after date, is the one in controversy.

On February 15, 1910, W. H. Pritchett and wife, and C. W. Pritchett, conveyed the lot and building in Chickasha, Oklahoma, in which the laundry plant was conducted, to T. W. Pritchett for \$1.00 and other good and valuable consideration, subject to a mortgage thereon for \$3,500.00. On the same day, T. W. Pritchett conveyed the same property to Martha Arnold Pritchett in consideration of love and affection and services theretofore rendered him in sickness, in his old and declining years. On the same day, the Martin & McKennon note for \$1,750.00 was assigned by C. W. Pritchett and W. H. Pritchett to Martha Arnold Pritchett, by the following endorsement:

"For value received, we hereby sell, assign and transfer the within note to Martha Arnold Pritchett, this 15th day of February, 1910."

In the month of June, 1910, the Kentucky Bank & Trust Company brought suit to recover on the three notes executed by T. W. Pritchett, C. W. Pritchett and W. H. Pritchett, and to enforce the mortgage lien on the property of T. W. Pritchett. The property was sold, and the bank became the purchaser at the price of \$4,000.00. After this sum was credited on the notes there was left an indebtedness of about \$2,375.00. For

the remainder of the judgment, execution was issued and returned no property found.

On June 23, 1910, W. H. Pritchett filed, in the United States District Court for the Western District of Kentucky, his voluntary petition in bankruptcy. He was duly adjudged a bankrupt and given his discharge.

On April 4, 1912, the present action was instituted. The basis of the defense is, that the note was transferred from W. H. Pritchett and C. W. Pritchett to their father to discharge their indebtedness to him, and by their father to Martha Arnold Pritchett, to discharge his indebtedness to her; that at most the transaction was merely a fraudulent preference, and not having been attacked within six months cannot now be set aside.

We deem it unnecessary to detail the evidence, which is quite voluminous. It is clear that the assignment of the note in question was made in Kentucky, and the validity of the assignment must be determined by the law of this state. The evidence for the defendants is that W. H. Pritchett and C. W. Pritchett were indebted to their father, T. W. Pritchett, and conveyed to him the Oklahoma real estate, and also turned over to him the note in question, to pay their indebtedness to him, and that the real estate was then conveyed to Martha Arnold Pritchett, and the note in question assigned to her at the direction of T. W. Pritchett, in consideration of both past and future support. It must be remembered, however, that T. W. Pritchett, as well as his sons, was indebted to plaintiff. It is conclusively shown that W. H. Pritchett consulted an attorney with the view of devising a plan by which to place his property beyond the reach of creditors. A careful reading of the deposition of T. W. Pritchett shows that he knew practically nothing about the transaction, and that he was used as a mere dummy for the purpose of transferring the title to Martha Arnold Pritchett. While the real estate was conveyed to T. W. Pritchett and then reconveyed by him on the same day to Martha Arnold Pritchett, not even this formality was observed in the assignment of the note. The note was never transferred to T. W. Pritchett, but was assigned directly by the payees to Martha Arnold Pritchett.

Indeed, the evidence that T. W. Pritchett ever had possession of the note, or accepted it in payment of any indebtedness to him, or that the assignment by the payees to Martha Arnold Pritchett was made at his

direction is by no means satisfactory. Furthermore, the evidence that T. W. Pritchett had ever been dependent upon Martha Arnold Pritchett for support is not persuasive. On the contrary, he seems to have been the one who owned all the property and was the mainstay of his sons and his daughter-in-law, and if there was any liability on either side, it was in his favor rather than in favor of his daughter-in-law. In a case like this, the courts will look at the substance and not the form of the transaction, and where all the circumstances show that the purpose of the parties was to place their property beyond the reach of their creditors, and that this was the effect of the plan adopted, the transaction will not be permitted to stand unless the evidence of the good faith of the parties is more satisfactory than that presented in this record. We therefore conclude that the assignment of the note was without consideration, and that this fact was known to Martha Arnold Pritchett. Hence it follows that the transaction was a fraud on the creditors and that the chancellor did not err in so holding.

Judgment affirmed.

Ashless Coal Company, et al. v. Davis.

(Decided February 25, 1919.)

Appeal from Perry Circuit Court.

1. Bills and Notes—Negotiability—Merchandise Coupons.—Coupon books issued by a coal company to its employees, which by their terms are redeemable only in merchandise and are not transferable, are not negotiable.
2. Assignments—Action by Assignee—Necessary Parties—Assignor.—The assignee of non-negotiable merchandise coupon books, issued by a mining company to its employees, cannot recover thereon without joining his assignors as parties plaintiff or defendant.
3. Actions—Merchandise Coupons—Assignments—Joinder of Causes.—Plaintiff, as assignee of certain merchandise coupon books issued by a mining company to its employees, brought suit thereon and sought a recovery not only against the mining company, but against his assignors. Held, that as the liability of the various assignors was not joint, but separate and distinct, each of the coupon books was a separate cause of action, which did not affect all the parties to the action as required by section 83, Civil Code, and that the several causes of action were improperly joined,

and it was error to refuse to require plaintiff to elect which cause of action he would prosecute.

4. Assignments—Merchandise Coupons—Liability of Assignors.—In an action by the assignee of merchandise coupon books, issued by a mining company to its employes, to recover of the mining company and his assignors, it was error to render judgment against each of the assignors for the full amount sued for, since each was liable only on his own assignments.

NICKELL & TYNES for appellants.

JOHN B. EVERSOLE for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

The Ashless Coal Corporation operates a coal mine at Lothair, in Perry county, and pays its employes in script, issued in book form, and redeemable in merchandise at its commissary. During the years 1916 and 1917, it issued to sixty-seven of its employes individually, script, in different amounts, ranging from \$1.00 to \$5.00. The script thus issued was sold by each of the employes to Christ Davis, who conducts a store near the company's commissary. The aggregate amount of the script was \$309.35.

This suit was brought by Davis against the coal company and the sixty-seven assignors to recover the value of the script assigned, and a recovery was sought not only against the coal company, but against each of the defendants. The coal company filed a motion to require plaintiff to elect which of the several causes of action he would prosecute, and without waiving this motion, it also filed a special demurrer. Both the motion to elect and the special demurrer were overruled, and the company having declined to plead further, judgment was rendered not only against it, but against each of the defendants for the full amount sued for. From that judgment the coal company and fifteen of the other defendants appeal.

The principal question for discussion is whether the motion to elect was properly overruled. Under our Code, several causes of action may be united, if all of them be brought upon contracts express or implied, and if each affect all the parties to the action. Section 83, Civil Code. It is the settled rule in this state that coupon books issued by a coal company to its employes, and by their terms redeemable only in merchandise and not transferable, are not negotiable, and that an assignee thereof cannot re-

cover thereon without joining his assignors as parties plaintiff or defendant. *Pond Creek Coal Co. v. Riley Lester & Bros.*, 171 Ky. 811, 188 S. W. 907. In view of this rule, plaintiff made the assignor of each of the coupon books in question a party defendant. Not only so, but he sought a recovery against each of them. There was no joint liability on the part of the various assignors, but the liability of each was separate and distinct from that of the others, and a defense against a particular assignor was not available against the other assignors. Under these circumstances, each of the coupon books was a separate cause of action which affected only the plaintiff, the coal company and the assignor thereof. It follows that each cause of action did not affect all the parties to the action, and that the several causes of action were improperly joined. *St. Joseph Orphan Society v. Wolpert*, 80 Ky. 86. Therefore, the trial court erred in overruling the motion to elect.

Of course, each of the assignors was liable only on his own assignment. Notwithstanding this fact, judgment was rendered against each of the assignors for the full amount sued for, thus making him liable not only for what he himself received from plaintiff, but for all that the other assignors received. This furnishes an additional reason why the judgment should be reversed on the appeal of the assignors.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

McMurry, Committee v. Mimms, et al.

(Decided February 25, 1919.)

Appeal from Todd Circuit Court.

Appeal and Error—Agreed Judgment.—A party, who makes no defense to an action, and by his answer, makes no issue, and agrees, that the judgment may be rendered, will not be heard upon appeal from it.

W. B. REEVES for appellant.

JAS. R. MALLORY for appellees.

OPINION OF THE COURT BY JUDGE HURT—Dismissing appeal.

This is an appeal from a judgment rendered against a person, of unsound mind, and her committee. The committee appeared and filed answer for himself and his ward, in the circuit court, and appears for the ward upon this appeal. No issue was made in the circuit court. The allegations, of the petition, were not denied by the answer, but, the averments of the petition, were, affirmatively alleged to be true, by the answer, and the relief sought in the petition, was agreed to, by the answer. No relief was sought in the answer of any kind, but, it was expressly averred, that the defendants, appellants, here, had no cause of complaint. The committee, having agreed to the judgment appealed from, can not, now, be heard upon an appeal from the judgment. An action, in which no issues are made, and all the parties agree, and the judgment rendered is in accordance with the agreed facts, does not present anything for the determination of a court of review. The committee does not seem, however, to occupy a disinterested position, between his own interests and those of his ward, and a guardian *ad litem* was not appointed to represent her. The appeal, is therefore dismissed, but without prejudice to any right of the ward, if any, she has.

Jones v. Louisville & Nashville Railroad Company.

(Decided February 28, 1919.)

Appeal from Bullitt Circuit Court.

1. Master and Servant—Hours of Service Act.—A section hand sweeping snow from the switches in a railroad yard is not an employe within the Hours of Service Act, which applies only to persons actually engaged in or connected with the movement of trains.
2. Master and Servant—Hours of Service Act.—Sweeping snow from a switch in a railroad yard has no connection with the movement of trains under the act of Congress of March 4, 1907.

C. P. BRADBURY for appellant.

J. F. COMBS, MOORMAN & WOODWARD and BENJAMIN D. WARFIELD for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

The appellant, Will Jones, was a section hand, employed by the appellee, and at the time complained of in the petition was engaged in sweeping snow from the switches connected with the tracks in the company's yards at Shepherdsville, Ky., and which include the main tracks of the appellee. Appellant alleges that he was required by the company to work for a period of 24 hours on January 13, 1917, in violation of what is known as the Hours of Service Act, passed by the federal Congress, March 4, 1907, chap. 2939, 34th stat. 1415 (U. S. Comp. St. Supp. 1911, p. 132), and that while so engaged, on account of the excessive number of hours he was required to labor, his feet were frozen and he was permanently injured. The lower court sustained a demurrer to the petition as amended and plaintiff has taken an appeal to this court.

In the first section of the act referred to is this language: ". . . and the term 'employees,' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 2 is as follows: "That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty; Provided, That no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any

week; Provided further, The Interstate Commerce Commission may, after full hearing in a particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

In section 3 it is provided that the provisions of the act shall not apply to the crews of wrecking or relief trains.

The Employers' Liability Act of 1906, which was approved June 11, 1906, 34th Stat. at Large, 232, chap. 3070, embraced and included "any employe of an interstate carrier." Many cases have come before this, and other courts, seeking a construction of said last named statute, as to its applicability to certain named employes, and it has been held to embrace practically every class of persons employed by an interstate carrier, the test being that the employe received his injury "while engaged in interstate commerce for the company." A very full discussion of those embraced in the act will be found in *Probus v. I. C. R. R. Co.*, 181 Ky. 7.

In the employers' liability cases, 207 U. S. 463, 498, in discussing the act of 1906, Mr. Justice White said:

"Thus, the liability of a common carrier is declared to be in favor of 'any of its employes.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employes of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from 'the negligence of any of its officers, agents or employes.'"

In construing this Employers' Liability Act of 1906, together with the amendments thereto, the court, in *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328, held that an employe of the company who was doing the same character of work as the appellant in this case, was engaged in interstate commerce and therefore within the act.

It is clear, however, from a reading of the two statutes that congress intended by the Hours of Service Act to restrict and limit the persons to be affected by it, by

confining its provisions to those employes or persons "actually engaged in or connected with the movement of any trains." This fact is emphasized by the provision in section 2 relative to operators, same being limited to operator, train dispatcher "or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders *pertaining to or affecting train movements.*"

In discussing the difference between the two statutes above referred to this court in *L. & N. R. R. Co. v. Walker's Admr.*, 162 Ky. 209, thus states: "The Federal Hours of Labor Act, making it unlawful for any carrier to permit an employe subject to the act to be or remain on duty for a longer period than sixteen consecutive hours, defines employes as 'persons actually engaged in or connected with the movement of any train.' *Osborne's Admr. v. C. N. O. & T. P. Ry. Co.*, 158 Ky. 176. But the Federal Employers' Liability Act, providing that the common carriers subject to the act shall 'be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier' does not undertake to define the meaning of the word 'employed' as used in the act or to describe, except as indicated, the employes to whom the act applies."

Osborne's Admr. v. C. N. O. & T. P. Ry. Co., 158 Ky. 176. Plaintiff's decedent was a brakeman in the employ of the railway company. The main question involved in this case related to the actual time that decedent was on duty, but after referring to rule No. 74, promulgated by the Interstate Commerce Commission, relative to employes dead-heading on trains, the court, in answering the argument that although *Osborne* did not have any duties to perform in connection with the movement of the train on which he was riding or the movement of any other train, he was, nevertheless, on duty in the sense that he was acting under the orders and directions of a superior and did not have the full and free opportunity contemplated by the statute to take subject to his own volition the rest allowed, says:

"There is much force in this position, and if the act permitted us to do so we would be disposed to say that an employe was engaged in service when he was acting under the orders and directions of a superior, although

these orders or directions might not impose upon him the performance of any particular duty in connection with the movement of any train. But the act is not fairly susceptible of this construction. In carefully chosen words it describes an employe as a person who is 'actually engaged in or connected with the movement of any train,' and the hours of service feature of the act only apply to such a described person. Manifestly Osborne was not actually engaged in or connected with the movement of the train on which he was 'dead-heading,' because the uncontradicted evidence is that he had no duties of any kind or character to perform in connection with the movement of this train and was not charged with any responsibility in relation thereto; nor could he have been engaged in or connected with the movement of the train on which he was to leave Oakdale at 6:15 a. m. the following morning, for the train on which he was riding as a 'dead-head' reached Oakdale at 12:45, and the train on which he was a brakeman was not due to leave there until 6:15 a. m. The hours of service he was engaged in did not begin when he was ordered to 'dead-head' any more than they did when he was called at 5:30 a. m. to leave his boarding house. The plain reading of the act forbids its application to an employe who is not actually engaged in or connected with the movement of any train, and the railroad company does not violate the act, nor does the employe come within its protecting provisions unless it be shown that he was actually engaged in or connected with the movement of the train in the manner we have described for a longer period than the act allows without having the rest allowed by the act."

What then is meant by the movement of any train? Webster's International Dictionary thus defines the word "movement:" "Act of moving; change of place, position, or posture; transference or passing from one situation to another; a particular act or manner of moving; as the movement of a wagon; the movement of freight; a system of mechanism for transmitting a definite motion, or for transforming motion."

The Interstate Commerce Commission on March 16, 1908, issued certain rulings interpreting the act of 1907 as follows:

"The act does not specify the classes of employes that are subject to its terms. All employes engaged in or connected with the movement of any train, as described

in section 1, are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen, who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch tenders, tower men, block signal operators, etc., come within the provisions of the statute." From the employees enumerated above it is manifest the commission had in mind the same thing, viz.: that the act was not so broad as the Employers' Liability Act, but had a far more restricted meaning, because it would seem that the persons embraced within the act, as interpreted by the Interstate Commerce Commission, were those engaged in or performing services directly connected with the movement of trains. Train dispatchers direct the movement of all trains; telegraphers communicate orders from the dispatcher to the conductor and engineer. The tower men and block signal operators regulate the movement of trains within their several jurisdictions. Yardmen and switch tenders, as hereinafter noted, have been held within the act where their duties caused them to regulate and direct the movement of trains through the yards, being embraced within the words "other employees," in that portion of section 2 of the statute referring to operators, etc. Conductors, engineers, firemen, brakemen and train baggagemen constitute the crew and their every duty is connected with the movement of trains.

In *Schweig v. Chicago, M. T. St. P. R. Co.*, 205 Fed. 96, the court held that an employe whose duties were to assist in driving cattle from the yard and chutes into cars; to place boards so that the live stock could pass from the platform into the cars; to fill the water troughs, with which some of the cars were equipped, and to put sand upon the floor of the cars did not come within the provisions of the act, and this although the stock cars were for interstate shipment. The court uses this language: "I cannot see how he can be said to have been engaged in the movement or operation of a train when he was around these stockyards. He was directed to get these cars ready for service by putting boards between the platforms and the cars, so that the cattle could pass over them into the cars. He was simply getting the car ready for movement; but he was not moving it, nor was he engaged in the movement of it. He was not engaged, within the terms of this statute, in the movement or operation of any train."

In the earlier part of the opinion, in discussing the reasons that led to the passage of this act and the persons it was intended to include, the court states: "I have examined most of the cases in this pamphlet published by the Interstate Commerce Commission, and all of them except two, as near as I can ascertain, relate to conductors, engineers, or trainmen. In one of the two cases the employe was a switchman, and in the other he was said to be a flagman, but it turned out that the flagman was really a brakeman on a passenger train. It turned out, too, that the switchman was engaged in telephoning orders from the train dispatcher, so that he came more under the head of a train dispatcher. With the exception of these two cases, I have not found a single case which comes anywhere near extending the purposes of this act to the case which we have here now. It is important, in determining what the act means, to ascertain why it was passed. The Supreme Court, in the case of *Baltimore & Ohio Ry. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878, said:

"The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes and travelers, congress was limited to the enactment of laws relating to mechanical appliances; but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers and other persons embraced within the class defined by the act."

"It is true that the Supreme Court did not undertake to name all the persons to whom the act could extend; but it seems that, in naming certain persons to whom the act does extend, it intended to indicate that to come within the act any one not named must be one who comes somewhere near being engaged in duties similar to those mentioned."

The foregoing case was affirmed by the Circuit Court of Appeals, 216 Fed. 750, and from the opinion of the latter court we quote as follows: "In riding upon the

engine, Schweig and the other employes had nothing to do with its operations or movement. Their work was entirely independent of this, and it seems clear that in performing the work, which the record shows that Schweig performed, he was neither within the spirit or the letter of the Hours of Service Act. He was neither engaged in nor connected with the movement of the train. Whether Schweig was tired and exhausted by reason of continuous service did not affect, and could not affect, the movement of the interstate train."

In speaking of the reasons leading up to the passage of the act we find this statement in *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471: "Experience has shown that many serious accidents to trains, causing great loss of life or permanent disabilities to passengers, as well as employes, are often due solely to the fact that members of the train crew had become exhausted by reason of being required or permitted to remain on duty for too long a period, and therefore unable to give that care and attention necessary for the safety of the train. To prevent accidents from such causes the Congress, in its wisdom, enacted the statute prohibiting railroads, not only from requiring any employe subject to the act to remain on duty for a longer period than 16 consecutive hours, but also 'permitting' it."

In *United States v. Pennsylvania R. Co.*, 239 Fed. 576 (District Court), the court held that a yardmaster in a railroad yard, to whom was given certain duties to aid and inform operators of trains and enable them to regulate and control such movements was included in the statute, buildings where the yardmaster was stationed being equipped with telephones and speaking tubes, the yardmaster directing what track should be used by the trains. The court says that there might be room for argument as to whether a yardmaster was within the act but for rule 706 of the company, which expressly classifies yardmasters among employes who give orders "affecting train movements;" for said rule expressly provides that yardmasters "have charge of the movements of trains within the parts of the yard limits assigned to their charge; and under rule 707 it is provided that freight conductors "must obey orders of yardmasters."

In the course of its opinion the court says: "We are in entire accord with him (counsel) that yardmasters do not belong to the class of dispatchers or operators who have to do with train movements. If the words 'other employes' are to be given this significance, we think the viewpoint of the defendant to be the correct one. Much may be said in support of this. It is a resulting consequence of the *ejusdem generis* doctrine. We do not think, however, the doctrine to have application. The word 'other' is, we think, not used in the sense of 'others of the same class,' but in the 'and also' sense. Congress did not command that train dispatchers and operators and other employes of the same class, but that dispatchers and operators and also all employes, whether of the same class or not, who directed train movements, and who used the telegraph or the telephone in the discharge of their duties, should be subject to this provision of the act. Under rule 706 we feel compelled to find that yardmasters 'transmit, deliver and receive by telephone orders pertaining to and affecting train movements.'"

The court admits that the case is a close one, and says: "As remarked before in other cases, a given case may require us to stand so near the dividing line that its ruling partakes too much of the character of a 'rescript' to be altogether satisfying." That even this case was the "dividing line," and a "close one," as stated by the court, is shown by *Missouri Pac. Ry. Co. v. United States*, 211 Fed. 893, where the Circuit Court of Appeals, in reversing the District Court for the Western District of Missouri, held that a switch tender whose duty it was to operate certain switches regulating trains, pursuant to directions given him by telephones connected with a shanty erected at his place of employment, was not embraced within the terms "other employe," in section 2 of the statute; and the railroad company was not liable for a penalty thereunder because it required such employe to work beyond the specified hours. We quote from this opinion as follows: "As the word 'employe' in the proviso of section 2 includes 'operator' and 'train dispatcher,' for the latter are both employes, the conclusion here is irresistible that Congress intended by the use of the words 'other employe' to mean an employe engaged primarily in the same class of service as would be performed by an operator or train dispatcher. If this

be the right construction to place upon the proviso, then R. Connell and J. W. King were not in any sense employes, whose primary duty was to dispatch, report, transmit, receive or deliver by the use of the telegraph or telephone orders pertaining to or affecting train movements within the meaning of the proviso. While, as has been said before, we must give the law such a construction as will promote the purpose of the law, in our zeal to do so, however, we must not attempt to legislate ourselves. We are cited to the case of *United States v. Houston Belt & Terminal Ry. Co.*, 205 Fed. 344, 125 C. C. A. 481. In regard to this case, it is sufficient to say that the facts which appear in the report of that case differ from the facts in the present record."

United States v. Great Northern Ry. Co., 206 Fed. 838. This was a proceeding to recover a penalty against the company for a violation of the act. The train, on which the employe involved was a fireman, was placed on a siding and there remained for a considerable period of time. All the employes except Bergen, the fireman, were relieved of all duties pertaining to the train, and he was required to remain on duty as an engine watchman. The court says: "From this abstract of the facts, as stipulated, it appears that Bergen was actually engaged as fireman a little less than 16 hours, but as fireman and engine watchman he was on duty continuously for 24 hours, and the question for determination therefore is whether, under the circumstances, his service as engine watchman brings the case within the statute. Conceding, as urged, but not deciding, that Bergen's service as engine watchman was not directly connected with the movement of the train, he was primarily a locomotive fireman, and, as such, an 'employe' as defined by the act, and was therefore subject to its operation."

In affirming the judgment of the District Court, the Circuit Court of Appeals (211 Fed. 309) held that Bergen's duties in watching the engine were in effect the same as those he performed as fireman, stating that in no sense or particular were they different; that when a locomotive is actually running, the duties of the fireman may be more strenuous and occupy his time to a greater extent than when the locomotive is tied up on a siding, but that would be merely a question of degree and would not affect the general nature of the duties of his occupation.

Chicago & Alton Ry. Co. v. United States, decided May 20, 1918, U. S. Sup. Ct. Adv. Ops., 1917-1918, page 580, was a suit to recover a penalty for violating the Hours of Service Act, by permitting a switch tender to remain on duty more than nine hours. The court thus states the duties of the employe involved: "The work of these employes is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard; the telephones are used to permit the yard master, who directs all yard movements, to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to handling of cars or trains, or as to any other work that he may desire performed. The telephones at the three places were installed principally for the purpose of making more convenient communication between the yardmaster's office and said shanties." And in the concluding part of the opinion the court says: "Here, the facts disclose the switch tender on duty, for twelve consecutive hours in a shanty continuously operated night and day where, by the use of the telephone, he received and delivered orders pertaining to train movements—*not mere switching movements within the yard*; and in such service mental and physical alertness are of great importance. By permitting this the railroad violated both language and purpose of the act." Thus the court excludes from the provisions of the statute an employe engaged in switching movements within the yards.

It is claimed by appellee that appellant failed to allege that his injury was due to the fact that he was required or permitted to work for more than 16 hours, and that he does not show that the injury complained of happened beyond the 16 hour period. Because of the conclusion we have reached on the other phase of the case we do not find it necessary to discuss this question, but suffice it to say that the Supreme Court of the United States, in *St. L. Iron Mtn. & S. Ry. v. McWhirter*, 229 U. S. 265, has held that in order to render the carrier liable under the Hours of Service Act there must be proof showing some connection between the excessive hours of employment and the injury.

To hold that an employe, performing duties such as appellant was engaged in at the time he received the injuries complained of, was embraced within the provisions of the Hours of Service Act, would, in our opinion,

be giving to the act a construction never intended by congress.

The federal court has not gone so far. For example, they reluctantly held that a yardmaster was included, and only did so because a rule of the company stated that yardmasters performed duties pertaining to the movement of trains. A switch tender has been held not to be included in the words "other employes" in section 2, relating to operators, etc. And in another case the District Court was unwilling to decide whether a man watching an engine was included, but the Circuit Court of Appeals held that such an employe was included because he was, in effect, performing the duties of a fireman, which was said employe's regular occupation.

Aside from these cases we think the language of the Supreme Court of the United States, in the case last above cited, is conclusive of this question, where, in referring to the duties of a switch tender, who was held to come within the operator class, it is said that he received and delivered orders pertaining to train movements, *not mere switching movements within the yard*, thus drawing a distinction between the movement of trains as contemplated by the statute and mere switching movements within the yard. We can see no difference between switching movements in the yard and the cleaning of snow from switches. As we understand the work being done by appellant it was not necessary to the movement of through trains, or train movements within the intentment of the act, but was only to keep the switches in such condition in the yard at Shepherdsville that the switches might be used for switching or yard purposes. But for the yard tracks there would have been no more necessity to have cleared these switches than it would have been to keep the snow from every switch on the company's line.

We have found no case holding that a section hand or anyone engaged in similar work, was included in the act. Were we to so hold, it is difficult to conceive of any employe having outside work for the company who would not be included. The act is not so comprehensive. The reasons leading to its passage we have heretofore given. It was not the intention to give it as wide a scope as the Employers' Liability Act.

The demurrer to the petition as amended was properly sustained.

The conclusion reached, we believe, is expressive of the intention, the aim and the purpose of congress, and is in accord with all the decisions construing the act and to otherwise construe it would be to so warp and distort the language used as to give it a meaning never contemplated. This we are not willing to do.

The judgment is affirmed.

Johnson v. Johnson.

(Decided February 28, 1919.)

Appeal from Pike Circuit Court.

1. **Equity—Relief.**—Where issue is joined in a suit in equity the court may under a prayer for general relief grant any relief to which the parties show themselves entitled.
2. **Divorce—Cruel and Inhuman Treatment.**—A base and unfounded charge of unchastity and adultery made by the husband against his wife constitutes such cruel and inhuman treatment as to entitle her to a divorce upon that ground; but the charge by the husband in order to amount to such cruelty must be deliberately made and not made capriciously or in a fit of jealousy or under circumstances not showing a determination to falsely prefer the charge.
2. **Divorce—Alimony—Discretion of Court.**—The question of the amount of alimony to be allowed the wife upon the granting of a divorce is one which addresses itself to the sound discretion of the court in the light of the facts of each particular case, there being no definite and fixed rule upon the subject.
4. **Divorce—Alimony—Allowance—Appeal and Error.**—Where the testimony shows to a reasonable certainty that the husband possesses property to the value of between \$4,000.00 and \$5,000.00, and the wife has property to the amount of only about \$650.00, and has in her custody two of the infant children, an allowance to the wife of \$750.00 and of \$100.00 to her attorney will not be disturbed as excessive.
5. **Divorce—Alimony—Evidence.**—Where the husband seeks a divorce upon the sole ground of himself and wife living apart without cohabitation for five years, the wife by her answer may seek and obtain alimony, provided she was not at fault in bringing about the separation.
6. **Limitation of Actions—Pleading.**—The statute of limitation in order to be taken advantage of must be pleaded.

JAMES M. ROBERSON and R. H. COOPER for appellant.

CLINE & STEELE for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

This is a divorce suit brought by appellant (plaintiff below) against the appellee (defendant below) seeking a cancellation of the bonds of matrimony solely upon the ground that the parties lived apart without cohabiting for five consecutive years next before the filing of the suit. The answer denied the five years' separation, claiming that it had been only four years, and further pleaded the statutory grounds that plaintiff had habitually behaved toward her for a period of not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness, and that he had been guilty of attempting to cruelly beat and injure her so as to indicate an outrageous temper in him and to create probable danger to her life or great bodily harm from remaining with him. She asked that she be allowed \$2,500.00 alimony for the support of herself and two of the four infant children born as a result of their marriage. A reply put in issue the allegations of the answer, and upon trial the court dismissed the petition and granted defendant an absolute divorce and allowed her as alimony the sum of \$700.00 and attorney's fee, amounting to \$100.00, and to reverse that judgment plaintiff prosecutes this appeal.

Plaintiff and defendant were married in 1900. They each had children by a former marriage and they with their children resided after their marriage upon a farm owned by plaintiff until March, 1912, when defendant left the home of plaintiff with the intention of permanent separation, and she has continuously lived separate and apart from him since that time. Two of the children went with the defendant at the time of the separation, and two remained with plaintiff.

Three grounds are urged for a reversal of the judgment: (1) That it is void, since there is no specific prayer for a divorce in defendant's answer and counterclaim. (2) That there was a failure of proof on the part of defendant of the charges contained in her answer, and (3) that both the alimony allowance and the attorney fee—even if authorized under the evidence—are excessive.

Considering these grounds as briefly as possible:

(1) The closing of the prayer in the answer and counterclaim says "she prays that a general order of attach-

ment issue, and for all relief that to her in law or equity belongeth that the court may deem meet and proper." This court has frequently held that under a general prayer like this when issue is joined the court may grant any relief, whether specifically prayed for or not, to which the proof in the case shows the party entitled. In the case of *Heckling v. Gehring's Exr., &c.*, 30 Ky. Law Rep. 1198, this court in speaking upon the point said: "Under the Civil Code of Practice, sec. 90, upon issue joined in an action in equity the court may grant any relief that the parties may show themselves entitled to, whether it is specifically prayed for or not, if the petition contained a prayer for general relief." See, also, *Bank v. Coke*, 20 Ky. Law Rep., 291; *Lillard v. Brannin*, 91 Ky. 511; *Bridgeford v. Barbour*, 80 Ky. 529; *I. C. R. R. Co. v. Davidson*, 115 S. W. (Ky.) 770, and *Alexander v. Owen County*, 136 Ky. 420. The cases referred to are not divorce suits, and if the rule prevails in cases other than divorce suits *a fortiori* would it apply in cases where no appeal is allowed, as is the case with a judgment granting a divorce. Indeed, it would be so whether a counter pleading was filed or not, since in divorce cases the law puts in issue all affirmative allegations relating to the grounds for divorce.

Under the (2) ground relied upon for a reversal it is strenuously urged that neither ground alleged by defendant for divorce is supported by the proof. We are only permitted to examine the testimony upon this point for the purpose of reviewing the judgment allowing alimony, since we have no right to do so for the purpose of determining the correctness of the judgment in granting the divorce. *Evans v. Evans*, 93 Ky. 510; *Anderson v. Anderson*, 152 Ky. 773; *Pemberton v. Pemberton*, 169 Ky. 476, and *Burns v. Burns*, 173 Ky. 105.

Defendant and some of her witnesses testified that on a number of occasions before the separation plaintiff attempted to strike her, but from some cause not explained he was prevented from doing so. It also appears that there were many quarrels and disputes between the two, but how these domestic storms were produced, who was to blame for them, when they occurred, or how long they lasted does not appear. It is easy to conclude, however, that there was but little domestic felicity or conjugal bliss to be found in the household. Perhaps these matters standing alone would not be sufficient to establish

the grounds relied on by defendant, but we find in the record an uncontradicted fact, which, with the circumstances related, we think, amply sufficient to establish the charge of habitual cruel and inhuman behavior on the part of plaintiff toward defendant so as to indicate a settled aversion to her; that fact is a false and unfounded charge of adultery and a false implication of lewd and lascivious conduct on her part. Courts have entertained different views as to the effect of such false charges as furnishing grounds for divorce. Some of them admit the relevancy of testimony establishing such false charges, which, in connection with other acts of cruelty would be sufficient to establish the statutory ground, while other courts hold that to so falsely accuse the wife is of itself such cruel and inhuman treatment as to entitle her to a divorce upon this ground. R. C. L. 345, 346; *Smith v. Smith*, 181 Ky. 55, and cases therein referred to.

In the case of *Logan v. Logan*, 171 Ky. 115, the charge against the wife was made by the husband in his answer to her petition. It was held on appeal that the proof failed to sustain it, and in answer to the contention that the wife had failed to sustain her grounds for divorce on the ground of cruel and inhuman treatment this court said:

"Under the rule announced in *Rogers v. Rogers*, 13 Ky. L. R. 526, 17 S. W. 573, this unfounded charge of adultery against the wife, made by the husband in his answer and cross-petition, considered in connection with the other proof of his cruel treatment of her, is sufficient to sustain the charge of cruel treatment. See, also, *Hooe v. Hooe*, 122 Ky. 590, 5 L. R. A. (N. S.) 729. The claim, therefore, that there was a total failure of proof upon the issue of cruel treatment is not sustained by the record; and consequently, the further contention that where the judgment of divorce is not sustained by any proof no alimony will be allowed, is without merit."

The *Rogers* case referred to in the excerpt was one in which the charge was made in the pleading of the husband but which he failed to sustain by his proof, and Judge Pryor, speaking for the court, said: "The charge of adultery is unfounded, and the attempt to fasten this offense on the wife, connected with cruel treatment, originating from a frame of jealousy that has dominated the judgment and better feeling of the husband, entitles the wife to have the marital relation severed."

In the case of *Barlow v. Barlow*, 28 Ky. L. R. 664, the charge was made by the husband not in any pleading in the divorce proceeding, but prior thereto. It was shown by the testimony in the case to be unfounded and false, and in determining that this constituted the statutory grounds for divorce the opinion says: "In the case of *Rogers v. Rogers*, 13 Ky. Law Rep. 527, this court held in effect that when a husband charged his wife to be unchaste and fails to support this charge, that this unsupported charge on the part of the husband against the wife was such cruel and inhuman treatment as entitled her to divorce and alimony."

We think these cases commit this court to the rule that a baseless and unfounded charge of adultery against the wife by the husband is such cruel and inhuman treatment in and of itself as to authorize the court to sever the marital relation at her instance. Indeed we can not well see how it could be otherwise. For, as said in the case of *Hooe v. Hooe*, 122 Ky. 590, "It is not necessary that the husband should be a wife-beater, or that his wife should apprehend violence at his hands. . . . Under the statute here invoked it is that species of cruel and inhuman treatment that indicates a settled aversion to the wife as permanently destroys her peace or happiness; and this character of cruelty may habitually manifest itself in various ways that fall short of assault or bodily injury, and are not attended with apprehension of violence or danger, and in the nature of the case each complaint under this statute must be determined by the facts as they are presented."

So may we say that the cruel and inhuman behavior of the husband toward the wife so as to indicate a settled aversion to her or to destroy permanently her peace or happiness need not be manifested by physical violence toward her, for if it be otherwise manifested and in its essence is cruel and inhuman and sufficient to destroy permanently her peace and happiness it will entitle her to a divorce.

A woman has no more sacred possession than her reputation for virtue, and if this priceless asset is attempted to be taken from her by the one upon whom above all others she must rely to preserve it, he could commit no more cruel act. We can conceive of nothing that the husband could do that would more certainly destroy permanently the peace and happiness of his wife, and cer-

tainly nothing else could he do that would more thoroughly establish his settled aversion to her. She has the right to look to her husband not only for protection from physical violence but also to defend her standing in the community as a virtuous woman, and when instead of doing so he himself becomes the unauthorized assailant of her chastity he inflicts wounds upon one whom he solemnly promised to protect and which are more cruel and excruciating and more destructive in their nature and effect than any he might produce by corporal punishment. Therefore, when he discards the sacred obligations which he as husband owes to his wife and assumes the role of destroyer of her good reputation, he should not be permitted, when called to an account in the wife's divorce suit, to be relieved through a construction of the statute which would confine its terms as including only his acts of physical violence. We would not be understood as holding that every charge of this nature made by the husband in a temporary fit of jealousy or made in a *bona fide* investigation of suspicious conduct on the part of the wife and without deliberation, and perhaps others, could be given the force and effect indicated, but we do mean to say that when such a charge is deliberately, basely and falsely made, it amounts to such cruelty as is contemplated by the statute, and authorizes the granting of a divorce to the wife upon her application. In this case the fact that the husband made the charge is abundantly proven and nowhere denied. Nothing appears in the record to justify it, and we have no hesitancy in concluding that the judgment upon this issue of fact is correct.

Under the (3) contention it is insisted that plaintiff is shown to possess property of the value of only about \$1,750.00; that the defendant owns a small mountain farm of the value of about \$650.00 and that the allowance of \$700.00 as alimony for the benefit of the wife and two infant children is excessive. Were we to accept these statements as true, the position of counsel would perhaps be correct, but our reading of the record convinces us of the incorrectness of the facts assumed. There was attached in this case about \$248.00 which plaintiff had on deposit in bank. A short while before he had sold a right of way through the farm upon which he resides, for which he obtained \$700.00, and it is in proof and not denied that a coal company has an option on the re-

mainder of his land at the price of \$3,162.00. He owns another farm in the same neighborhood, but there is no proof as to its value. He also owns some stock and other personal property necessary for the operation of his farm. Two of the four children born of the marriage live with defendant, to whom, and for whose benefit, he has contributed nothing since the separation except about \$2.50. It is true that he now has charge of the two younger ones, but it must not be forgotten that it is his primary duty to maintain and support all of his children, as well as his wife.

As stated in the cases of *Pemberton v. Pemberton*, and *Burns v. Burns*, *supra*, and cases referred to therein, there is no settled rule for measuring the amount of alimony which should be allowed in cases like this. Each case must be determined upon its own peculiar facts. Here we have the husband owning between \$4,000.00 and \$5,000.00 worth of property, while the wife owns about \$650.00 worth of property, being the amount which she inherited from her mother about the time of the separation. She in many ways assisted her husband to accumulate his property. Many of the cases referred to allow as much as one-third of the husband's property to the wife in the way of permanent alimony, and under the facts of this case and the rules of law governing such matters, we find no room for the contention that either the allowance to the wife or the fee of \$100.00 to her attorney was excessive.

Before closing this opinion we feel that we should say something about a question which is neither pleaded nor argued, but which appears in the case. A part of sec. 2120 of the Kentucky Statutes provides that "An action for divorce must be brought within five years next after the doing of the act complained of." This we construe to be purely an act of limitation; and while the grounds for divorce pleaded in the answer occurred more than five years next preceding the time of the filing of that pleading, and perhaps would have barred defendant's cause for divorce upon those grounds if contained in an independent suit, it does not necessarily follow that she is barred from relying upon them as counter grounds for divorce in her answer to a suit filed for that purpose by her husband. Besides, no plea of limitation was interposed, and unless done, the statute can not be taken advantage of. *Merritt v. Craven*, 168 Ky. 155.

In the case of *Brown v. Brown*, 172 Ky. 754, it is held that a wife may obtain alimony in a suit brought by her husband upon the sole ground of living apart for five years, provided the separation was not due to any fault on her part. There is no proof that the defendant in this case was in fault. So that in any view which we may take of the case the defendant was entitled to alimony, and the court did not err in making her the allowance.

Wherefore, the judgment is affirmed.

Chesapeake & Ohio Railway Company, et al. v. Ryan's Administrator.

(Decided February 28, 1919.)

Appeal from Carter Circuit Court.

1. **Railroads—Injuries to Trespasser on Train—Suit for Wrongful Death—Appointment of Administrator to Sue.**—The court of the county wherein a trespasser on a train is injured by the negligence of a railroad company may appoint an administrator to sue the company, though the deceased was a non-resident and died in another state, and left no property nor indebtedness due him in this state other than his right of action.
2. **Trial—Action for Wrongful Death—Negligence—Evidence—Sufficiency.**—In an action against a railroad company and its brakeman to recover damages for the death of a trespasser on a train, evidence examined and the question whether the deceased was forced off the train held for the jury.
3. **Trial—Action for Wrongful Death—Instructions.**—In an action against a railroad company and its brakeman for the death of a trespasser alleged to have been forced off the train while it was going at an excessive rate of speed, an instruction submitting this issue was not erroneous because it failed to tell the jury that the deceased was a trespasser, or that the defendants had a right to eject him if they used proper care in doing so, since even though the deceased was a trespasser, the company had no right to force him off the train while it was going at a dangerous rate of speed.
4. **Trial—Action for Wrongful Death—Instructions.**—In an action against a railroad company and its brakeman for the death of a trespasser alleged to have been put off the train while going at an excessive rate of speed, an instruction telling the jury that if they believed from the evidence that deceased voluntarily attempted to get off or alight, "without being forced to do so," and sustained the injuries complained of, they should find for the

- defendants, was not erroneous because of the use of the words, "without being forced to do so," since these words were necessary in order to give proper effect to the word "voluntarily."
5. Trial—Action for Wrongful Death—Instructions—Evidence—Error.—In an action against a railroad company and its brakeman to recover for the death of a trespasser, the refusal of the trial court to instruct the jury that the life tables introduced in evidence did not show the expectation of persons engaged in hazardous employments like coal mining, but only the expectation of persons accepted as approved risks by standard life insurance companies, and the admission of testimony that the deceased contributed to the support of his mother and was a good, moral boy, were not prejudicial errors, in view of the fact that they could have affected only the amount of the verdict, and the jury's finding was only \$3,000.00.
 6. Trial—Instructions.—Where the only issue in the case was fully covered by the given instruction, it was not error to refuse an offered instruction which submitted the same issue in a more confusing form.

SHELBY, NORTHCUTT & SHELBY, JAMES CLAY and H. L. WOODS for appellants.

THEOBALD & THEOBALD and J. POWELL ROYAL for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Charging that his intestate was forced by Charles Maddix, a brakeman in the railway company's employ, to leave a freight train while it was traveling at an excessive rate of speed, and received injuries from which he died, Jerome Duvall, as administrator of Hobert Ryan, deceased, brought this suit against the Chesapeake & Ohio Railway Company and Charles Maddix to recover damages for his death. From a verdict and judgment in favor of plaintiff for \$3,000.00 the railway company and Maddix appeal.

The intestate was injured in Carter county and was then carried by the railway company to Cabell county, West Virginia. At the time of his death, the intestate was neither a citizen nor a resident of the state of Kentucky. He owned no property of any kind in this state, and there was no debt or demand due him in this state. At the time of his death, he was a resident of Tazewell county, Virginia. The railway company was a citizen and resident of the state of Virginia, with its principal

office and place of business in the city of Richmond. After setting forth these facts, the first paragraphs of the separate answers filed by the defendants charged that the Carter county court had no power to appoint plaintiff administrator of the intestate, that said order was void and that plaintiff was without capacity to institute or maintain the action.

The alleged error of the trial court in sustaining a demurrer to this plea is the first ground urged for reversal. In the case of *Brown's Admr. v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639, we held that the court of the county, wherein a non-resident is killed by the negligence of a railroad company, may appoint an administrator to sue the company though the deceased leaves no property in the state other than such right of action. While it is true that the court said, "and we deem the court of the county, where the injury was done and where the man died, the proper court to entertain such jurisdiction," we do not regard the death of the intestate in this state as necessary to confer jurisdiction. The statute provides that damages may be recovered in every case of death resulting from injuries inflicted by negligence or the wrongful act of another, and that the action shall be prosecuted by the personal representative of the deceased. Section 6, Kentucky Statutes. While the statute has no extra territorial effect, it necessarily includes deaths resulting from injuries inflicted by negligence or wrongful act in this state, and it is therefore not material where the deaths occur. In other words, the cause of action arises in, and is controlled by the law of the state where the injury occurred. Since a foreign administrator cannot sue, it follows that a contrary view would deprive the intestate of the right to prosecute in the courts of this state, the right of action given by the statute. Hence, we conclude that the county court of Carter county, the place where the intestate received the injury resulting in his death, had jurisdiction to appoint plaintiff as the administrator of the intestate, notwithstanding the fact that the intestate was a non-resident of this state, and his death occurred in another state, and he left no property nor indebtedness due him in this state other than his right of action.

The next insistence is that the verdict is flagrantly against the evidence. It appears that Ryan was a boy, nineteen years of age. He resided at Pardee, Va., and

left there in company with three companions. They first went to Anwalt, W. Va., where they worked in mines for a while. They then went to Portsmouth, Ohio, and after working there a short time, started for McRoberts, Ky. They were "beating their way on freight trains." On the morning of the accident they were put off freight train No. 67 at Mt. Savage, the first station east of Hitchens. They then made their way to a point near Hitchens. West bound freight train No. 99 stopped at a point east of Hitchens, and the boys came toward the train apparently with the intention of boarding it. Maddix, the brakeman, motioned for them to stay off, but two got on at the undergrade crossing and the other two shortly thereafter. When Maddix approached the first two boys, they did not want to get off. Finally, however, they got off at a point west of the depot at Hitchens. They then tried to get back on the train, but Maddix watched them for some time. He then went to the third boy and told him to get off. Ryan was near the caboose and Maddix walked back to where he was. The speed of the train was then about twenty miles an hour. Maddix says that he found Ryan down in between two box cars and in a perilous position. He then motioned to the boy to come up on top of the cars, as he considered the speed of the train too great for him to get off in safety. When Maddix motioned for Ryan to come up, Ryan reached around and took hold of the ladder, and Maddix then stepped back a few feet from the end of the car. Maddix claims to have said nothing to the boy about getting off. When Ryan did not appear on top of the car Maddix looked over the side to see what he was doing, and saw him in a ditch four or five car lengths back, surrounded by section men. Ryan got off on the south side of the track, and there were four section laborers working near that point. The section men all say that they saw Ryan riding with his foot in the stirrup and that he just jumped or dropped off the car. The conductor, who was in the engine cab, stated that he saw Maddix walk back over the train; that Ryan put his foot on the ladder and held to the handhold, and rode in this position for two hundred yards. Ryan then got off, bounced forward and hit the bank and rolled back again. According to the evidence for plaintiff, Ryan fell in such a manner that his leg was thrown under the car, and he was so injured that he died soon thereafter. C. R. Hall testified that he reached

the point where the boy was hurt, within from two to five minutes after he got off the train. While lying there Ryan told him that Maddix had forced him off the train. J. O. Hall saw Maddix between the cars where Ryan was, just before Ryan got off the train. He reached Ryan in from two to five minutes thereafter, and Ryan said that the brakeman told him to get off or he would throw him off. Wick Fraley saw Maddix down between the cars with a man, making motions with his hands and head, just before the man came off. Ben Dickerson says that he reached Ryan as soon as he could walk about forty feet, and that Ryan told him that the brakeman tramped on his fingers and told him to hit the ground. W. D. Caudill states that he reached Ryan as soon as he could walk twelve or fifteen feet, and heard him say that the brakeman put him off the train, and made him hit the ground. The evidence of German Helms is to the same effect. It is argued that the evidence of the numerous witnesses, who testified to the circumstances under which Ryan got off the car, completely outweighs the statements made by Ryan. The difficulty with this contention grows out of the fact that the evidence of the section men does not necessarily contradict the statements of Ryan. They were not present and could not tell what actually took place between Ryan and Maddix. The only evidence of what then occurred consists of the statements of Ryan and those of Maddix. Viewing Maddix's testimony in the light of his admissions that he had previously put the other three boys off, it was certainly for the jury to say whether he actually forced Ryan to get off the train.

Instruction No. one is complained of because it did not tell the jury that Ryan was a trespasser, or that the defendant had a right to eject him if they used proper care in doing so. By the given instruction, the jury were told in substance to find for plaintiff, if they believed from the evidence that the intestate was forced off the train while it was running between twenty and thirty miles an hour, and by reason thereof received the injuries from which he died. This submitted the only issue in the case. The fact that Ryan was a trespasser was immaterial. The brakeman had no right to force him off of the train while the train was going at a dangerous rate of speed, and if the jury believed that such was the case, it was proper to hold the defendants liable.

Plaintiff also complains of instruction No. two, which is as follows:

"If the jury believe from the evidence that said Hobert Ryan voluntarily attempted to get off or alight from said moving freight train without being forced to do so, and sustained the injuries complained of in the petition, then in that event the law is for the defendants, and the jury should so find."

It is insisted that the instruction should not have contained the words "without being forced to do so." This complaint is without merit. Had the instruction omitted these words, the jury might have concluded that the act of Ryan was voluntary, whether he was ordered to get off or not, hence the words were necessary in order to give proper effect to the word "voluntarily."

The failure of the trial court to instruct the jury that the life tables introduced in evidence did not show the expectation of persons engaged in hazardous employments like coal mining, but only the expectation of persons accepted as approved risks by standard life insurance companies, and the admission of testimony to the effect that the decedent contributed to the support of his mother, and was a good, moral boy, are also urged as grounds for reversal. Manifestly, these alleged errors could have affected only the amount of the verdict, and since the finding in favor of plaintiff was only \$3,000.00, we do not regard them as prejudicial.

Another error relied on is the refusal of the court to give the following instruction:

"The jury will find for the defendant if they believe from the evidence that when defendant Maddix discovered the presence of decedent, Hobert Ryan, upon the train in question, he motioned for him to come up on the top of the train, even though they may also believe the decedent misunderstood the meaning of said motioning and construed it to be a signal for him to leave said train."

As before stated, the only issue in the case was whether the decedent was forced off the train, or voluntarily left the train without being forced to do so. This issue was fully covered by the given instructions, and it was not error, therefore, to refuse the offered instruction, which submitted the same issue in a more confusing form.

Judgment affirmed.

Rammage v. Kendall.

(Decided February 28, 1919.)

Appeal from Livingston Circuit Court.

Appeal and Error—Subsequent Appeal—Law of Case.—The facts being substantially the same, the opinion on a former appeal is the law of the case, and binding alike on the trial court and the Court of Appeals.

MOCQUOT & BERRY for appellant. .

CHARLES FERGUSON for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

This is the second appeal of this case. The opinion on the former appeal may be found in 168 Ky. 26, 181 S. W. 631, where the facts are fully set out. The suit was brought by Rammage against Kendall for false imprisonment. On the first trial, there was a judgment for Kendall. On appeal, we held that Kendall, as judge of the county court, was without jurisdiction to try Rammage, and reversed the judgment with directions to give a peremptory instruction in favor of the plaintiff, if upon another trial the facts were substantially the same. On the return of the case, another trial was had and a peremptory instruction given in favor of the defendant. Plaintiff again appeals.

We have carefully examined the evidence on the last trial, and so far as the jurisdictional facts are concerned, it is substantially the same as that heard on the first trial. That being true, the opinion on the former appeal is the law of the case, and binding alike on the trial court and this court. *Carter Coal Co. v. Dozier*, 179 Ky. 457, 200 S. W. 917. It follows that the trial court should have directed a verdict for plaintiff instead of defendant.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

Williamson v. Williamson..

(Decided February 28, 1919.)

Appeal from Pike Circuit Court.

1. **Divorce—Abandonment—Alimony.**—An action may be maintained by the wife for alimony independent of a suit for divorce, if the husband has abandoned her or treated her in such a cruel and inhuman manner as to force her to leave him, and she is without fault.
2. **Divorce—Pleading.**—In such action it is unnecessary to aver in the petition that cause for divorce had occurred or existed in this state within five years, as required in suits for divorce by section 423 of the Civil Code and section 2120, Ky. Stats.
3. **Divorce—Alimony.**—Such an action is transitory except as localized by section 76 of the Code to the county of the wife's residence, but over which any court having jurisdiction of the subject matter may acquire jurisdiction of the defendant where he is summoned or voluntarily appears and makes defense.
4. **Divorce—Cruel and Inhuman Treatment.**—Refusal of the husband to permit wife's children of tender years by a former marriage to remain in his home, under circumstances of this case, is such cruel treatment of the wife as justified her leaving him without forfeiture of her right to alimony.
5. **Divorce—Alimony.**—While allowance of \$1,000.00 as alimony to wife without fault for abandonment of husband who owns property of \$8,000.00 or more would be too small under ordinary circumstances, it is not so under peculiar circumstances of this case.

J. C. CANTRILL for appellant.

CLINE & STEELE for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

This is an appeal by the defendant from a judgment granting to his wife, a divorce, the custody of their infant child and "the sum of \$1,500.00 alimony, \$1,000.00 for herself, and \$500.00 for the use of their infant child."

The petition did not state a cause of action for a divorce (nor was one asked), because it failed to state as required by section 423 of the Civil Code of Practice, and section 2120 of the statutes, that the cause of action occurred or existed in this state, within five years next before the commencement of the action, but complaint is not made of the judgment for divorce, of which we have

no revisory jurisdiction. It is, however, insisted that because the petition does not state a cause for divorce, the court erred in awarding alimony, it being the contention of counsel for appellant that alimony can not be granted, except in a suit and as a part of a judgment for divorce, and we are referred to a statement to that effect in *Freeman v. Freeman*, 13 S. W. 246; but such is no longer, if ever, the rule in this state, as a suit for alimony may be maintained independent of and without regard to a divorce, where the husband treats the wife with cruelty, and compels her to leave him (*Hulet v. Hulet*, 80 Ky. 364) and, although the abandonment may not have continued long enough to entitle her to a divorce. *Steele v. Steele*, 96, Ky. 382; *Belcher v. Belcher*, 145 Ky. 309; 140 S. W. 309.

Since an independent suit may be maintained for alimony in the absence of grounds for divorce, it is manifest that the Code and statutory provisions referred to above have no application to an action for alimony, and in such an action it is not necessary to give the court jurisdiction or for any purpose that there should be an allegation that a cause for divorce had occurred or existed within this state and within five years next before the action was commenced; and it is necessary only to allege the marriage and facts showing an abandonment by the husband without fault upon the part of the wife, to state a cause for alimony.

It is purely an action *in personam* for the recovery of money, and therefore transitory, except as localized by section 76 of the Code of Practice "to subserve the convenience and possibly the interest of the wife," but over which any court having jurisdiction of the subject-matter may acquire jurisdiction of the defendant, when he is summoned to answer, or voluntarily appears, and makes defense; (*Johnson v. Johnson*, 12 Bush, 485; *Tudor v. Tudor*, 101 Ky. 530, 41 S. W. 768; *Gillen v. I. C. R. Co.*, 137 Ky. 375, 125 S. W. 1047); hence, there is no merit in the contention that because of the failure to make the allegations required in an action for divorce, the court was without jurisdiction of the subject-matter or the parties, and without power to award such alimony as the proof warranted.

2. The proof shows that the parties were married in West Virginia in 1912, and that in 1913 the plaintiff left the home of the defendant in West Virginia, and

returned to her former home in Pike county, Kentucky, where she has since continuously resided; that she has no property of any kind, except one cow, and that the defendant has property of the value of \$8,000.00 at least, that their marriage was the second for each, and purely a marriage of convenience, devoid of any sentiment whatever. At the time, plaintiff was a widow with two infant children of tender years, whom the defendant agreed should have a home with their mother in his home, and that he would provide for them.

To sustain her charge that she was compelled to and did leave the defendant because of his cruel and inhuman treatment of her (which is an abandonment by him, *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822) she testified that shortly after their marriage he began to manifest an aversion toward her children and treated them unkindly; that just before she left him he informed her that he would not continue to live with her unless she got rid of her children, which evidence appellant insists should have been excluded; but even if it were excluded, practically the same facts are proven by two witnesses for the plaintiff, Anse Blackburn and Acy Hensley, who testified that the defendant told them about the time plaintiff left him, that he had a home for her, but none for her children. Mrs. Harriet Blackburn stated that she never saw him mistreat his wife or his children, but that he pouted around and would not speak to her. The defendant does not contradict any of this testimony, nor testify at all on his own behalf, and this is about all the testimony in the case, except as to the value of defendant's property, and the evidence of neighbors that they never saw the defendant mistreat the plaintiff, and that so far as they knew or could see, he provided for her and her children a good home.

It would be hard to conceive of treatment that would be more cruel and inhuman by a husband toward a wife than the offer to live with her and give her a home only upon condition that she would get rid of her infant children by a former marriage, whom he knew were entirely dependent upon her when he married her, and agreed she might bring with her to his home; and that the defendant did this, and forced the plaintiff to leave his home, he does not even deny. The testimony therefore amply justified the chancellor in requiring the defendant to pay to plaintiff a reasonable alimony for herself, and

to provide a reasonable sum for the support of their infant child. The evidence shows that the defendant has a large farm and considerable personal property worth at least \$8,000.00, and probably more, and the alimony awarded was not only not excessive in amount, but under ordinary circumstances would have been entirely too little.

But the facts in this case are peculiar, and as the alimony to be allowed must always depend upon the circumstances of any particular case (*Burns v. Burns*, 173 Ky. 105), we have concluded that the amount allowed by the chancellor here should not be disturbed upon the ground of its insufficiency, as we are urged to do by appellee on the cross-appeal. The peculiar circumstances to which we refer, and which we regard as sufficient to sustain the judgment, are that this marriage was one purely of convenience, arranged by a go-between, without profession of love upon either side; the defendant has six or seven children by his first marriage, and plaintiff lived with him as his wife for only a few months, and under these circumstances, we do not feel justified in disturbing the chancellor's finding.

Quite an argument in justification of the defendant's action, assuming he did refuse a home to his wife's children by her former marriage, is based upon the proposition that the defendant was under no legal obligation to support his stepchildren, and quite a number of authorities from other jurisdictions are cited in support of the legal proposition, but we do not deem it necessary for the purposes of this case, to consider the question, because it is not involved here. Assuming that he was not liable for their support, we are nevertheless convinced their mother was justified in leaving her husband upon the ground of cruel and inhuman treatment, when he made it a condition to a continuation of their marital relations that she must put her children out of his home.

Another ground for reversal relied upon, is the fact that this court in *Stepp v. Stepp*, 178 Ky. 337, and many other cases, has stated that although a judgment for divorce improperly granted to the wife can not be disturbed, the evidence will be examined to see whether the judgment was authorized under the proof, and if not, a judgment for alimony will be reversed. But this statement was made where the grounds for alimony and di-

voice were the same, and upon a trial of both questions upon their merits and without reference to the requirements of the Code, that a petition for divorce shall state that the cause had occurred or existed within the state and within five years before the commencement of the action, which, as we have seen, is not required to be stated in an action for alimony; hence such cases are without applicability here, where facts were pleaded and proved, which authorized a judgment for alimony, although they were insufficient to constitute a cause for divorce.

Wherefore, the judgment is affirmed upon both the original and the cross appeal.

Illinois Central Railway Company v. Basham.

(Decided February 28, 1919.)

Appeal from Grayson Circuit Court.

1. Master and Servant—Personal Injuries—Evidence.—When a verdict for personal injuries is so large that it can be sustained only if the injuries are permanent, there must be positive and satisfactory evidence of permanency.
2. Damages—Excessive Damages.—A verdict of \$10,000.00 held to be so excessive as to indicate prejudice or passion upon the part of the jury, because of the inconclusive character of the scant evidence of permanency of injuries asserted to have resulted from an accident which seemed trivial at the time and was followed only tardily by any symptoms of serious injury.

M. A. ARNOLD, L. A. FAUREST and TRABUE, DOOLAN & COX
for appellant.

HAYNES CARTER and M. M. LOGAN for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

This is an appeal from a judgment of \$10,000.00 for personal injuries.

Although the instruction of which the defendant complains is erroneous in allowing damages for *any* negligence rather than that set up in the petition and described in the evidence, this error we are inclined to think could not have been prejudicial, because of another instruction which directed a verdict for defendant unless the jury believed the particular negligence relied on had

been proven; however, this question need not be further considered or decided, since we have concluded the verdict upon the evidence is so excessive as to necessitate a reversal and a new trial when the instructions can be more accurately prepared.

We find no merit in the contention that the court erred in refusing defendant a continuance because of the fact the injury had occurred only about sixty days before the trial, or in permitting the contradiction of the witness, John Cummings, or in its ruling with reference to the objection made to argument of counsel for plaintiff, so we shall confine ourselves to a consideration of the evidence as to the extent of plaintiff's injuries, it not being contended there was not enough evidence of negligence to carry the case to the jury.

Plaintiff testified he was 27 years of age; that before he was hurt by passing partially through the open hopper of defendant's car with the rock screenings that he was helping to unload, he was strong, able-bodied, weighed 156 pounds, and was earning \$1.50 a day; that in the accident complained of he was embedded in the screenings up to his hips or lower abdomen; that while he felt some pain at the time, he continued to work at shoveling the screenings off the track and later at tamping ties until quitting time, a period of more than two hours; that he got "pretty sore" and suffered considerable pain in his stomach, back and legs, before he quit work, but that he told his boss, a Mr. Lewis, he didn't think he was hurt; that after he quit work he helped "pump" the hand car for about a mile to Caneyville, where he lived, without any complaint of being injured or suffering any pain; that that evening after he got home, he began to suffer pains in his "privates" and discovered he could not control his urine; that he was unable to go to work the next morning, and has been getting worse ever since; that his testicles have shrunk to about one-third their normal size; his left leg is paralyzed, urine "dribbles" almost continuously; that his weight at the time of the trial had been reduced from 156 to 111 pounds, and he was unable to do any work or even walk; that he first called Dr. Barnett to see him, on the second day after the accident and being dissatisfied with him, called Dr. Glascock, who thereafter treated him, and who stated he was first called into the case February 21st, the sixth day after the accident.

Dr. Glascock testified in substance that he found plaintiff suffering from cystitis and paralysis of the motor nerves and muscles in and about the lower abdomen, resulting in an enlarged prostate gland, the paralysis of the left leg, an inability to control his urine, passages of which contained a "bloody scab formation," a paralyzed condition of the organs of generation accompanied by a "perishing" of the testicles; that when he first examined him, he found evidences of contusions on the penis and near the end of the spine; that all these conditions could have been caused by traumatism, and were "bound to be permanent;" that he was nervous and had been growing worse continuously, except for an improvement in the condition of his heart, and had fallen off in weight from 156 to 111 pounds; that he frequently used a soft catheter to empty the bladder, but that this could not have produced cystitis.

Dr. Ozement, who saw plaintiff four or five times from February 25th to April 12th, in consultation with Dr. Glascock, stated that he was suffering from violent cystitis (which he defined as an inflamed condition of the bladder), accompanied by a "dribbling" of urine in which there were "little scabby looking things;" that he also found considerable tenderness over the lower abdomen and in the region of the spine and a flacid tender prostate gland; that there was some atrophy and loss of mobility in the left leg; that the testicles were smaller than the average size, which might have been normal; that these conditions might have been caused from an outside traumatism, and frequently result from other causes, but could not have been produced by such a catheter as was used.

Dr. Clark was called in consultation by Dr. Glascock about fifteen or twenty days after the accident, and found plaintiff very nervous; that his left leg was partially paralyzed, as was also his bladder, resulting in his inability to hold his urine; that the prostate gland was very much enlarged, the testicles "showed some atrophy" until the left one was about "one-third of what it should have been" while the right one "wasn't so much wasted;" that there is some variation in size in different men.

Dr. Arms examined plaintiff just before testifying and stated he found the left leg partially paralyzed, urine passing involuntarily every little while, a consid-

erably enlarged prostate gland, a shrinkage in the testicles, the right one being about 50 or 60 per cent of the normal size, and the left one even smaller; that both were soft and "doughy;" that plaintiff was considerably emaciated and very nervous.

It will be noticed no witness for plaintiff except Dr. Glascock, testified that any of the described conditions were permanent or not curable, and the fact that such conditions had developed and grown gradually worse during about two months, can hardly be accepted as evidence of permanency.

For the defendant, Dr. N. Barnett, who was called to see plaintiff on the second and third days after the accident, and who, with Drs. Givens and Deweese, examined him again about a month later, testified that he was unable to find any bruise or contusion or any evidence of an injury of any kind; that there was nothing abnormal about his testicles or leg; that the latter responded normally to reflex tests, as it could not have done had it been paralyzed; that he was medical examiner for the defendant at Caneyville, and as such examined plaintiff in the summer of 1916, just prior to his employment by defendant, and that as far as he could remember there were no differences in the size of his testicles upon the several examinations; that at the March examination plaintiff complained of and there seemed to be involuntary passages of urine; that when he saw him on the two days in February, plaintiff had not suggested a lack of control of his urine, or of any trouble with his leg, and complained only of pains in his right side and somewhere about his bladder.

Drs. Givens and Deweese corroborated Dr. Barnett as to the condition of plaintiff at the March examination made by them, and in addition testified that the passage of urine, if involuntary, might have been the result of either cystitis or paralysis of the motor muscles or nerves, and if from cystitis, was curable, but if from paralysis it might not be; that they saw no indications of any paralysis and did not think cystitis could be produced by traumatism, but might result from an enlarged prostate gland or the use of a catheter.

Dr. Price examined plaintiff during the trial, and stated that after a thorough examination he could find no evidence of any injury to his body; that there was no enlargement whatever of the prostate gland; that his

testicles were soft and normal though below the average in size; that if they had shrunken from atrophy they would have been hard, which is not denied by any witness; that his left leg responded normally upon reflex tests; that the muscles contracted normally and it was not paralyzed; that plaintiff was simply sick and suffering from cystitis, which was curable, and most often caused by use of a catheter; that the pelvic structure is such that traumatism or force from the outside could not have produced any of the symptoms described.

Unless we are to accept Dr. Glascock's blanket assertion that all the conditions described by him are "bound to be permanent," cystitis is a curable disease because most of the physicians so state, and no one denies it. Dr. Glascock states plaintiff has this disease. Dr. Ozment states that when he first saw plaintiff he was suffering from violent cystitis, which is shown may have resulted from numerous causes, although the evidence is quite contradictory as to whether or not it could be caused by such an accident as happened to plaintiff, so if the jury believed that his most distressing inability to control the passage of his urine resulted from cystitis, which is decidedly the most reasonable deduction from all the evidence, and that this disease was the result of the accident, this condition could not have authorized a verdict for permanent injuries, because the disease is curable; nor is there any evidence that an enlarged prostate gland, which some of the witnesses state he had and might have been responsible for the condition, is not curable. Only if the condition resulted from a paralysis of the motor muscles and nerves which control the bladder and urethra, about which the evidence is most conflicting, is there any evidence it is not curable, and of this the evidence is not satisfactory as it amounts to only that if from paralysis the trouble might not be curable.

Every witness who testified concerning the reflexes of plaintiff's left leg, about the paralysis or any injury of which the evidence is very conflicting, states that it responded normally under test, except Dr. Clark, who states the reflex action seemed to be exaggerated, and that this proved the leg was not totally paralyzed; but that he believed there was a partial paralysis, because there was no sensation and plaintiff did not seem to be able to use it. Several witnesses state a leg can not be paralyzed that responds to the reflex tests, and this evidence is not contra-

dicted, so we think the most that can be made of the evidence for plaintiff as to his leg, is that he could not use it at the time of the trial and had been unable to do so for some time theretofore, but there is no evidence its use is permanently impaired, except the blanket statement of Dr. Glascock, which is overwhelmed by the evidence as to the proper tests of such impairment and the results obtained from the tests when made.

While the evidence proves that plaintiff's testicles were smaller than the average and one of them, and possibly both, is so shrunk as to suggest the possibility that they are as one witness stated "perishing," we think the evidence is wholly insufficient to warrant the conclusion that there is or will be a permanent loss of virility, because all of the witnesses who testify as to whether they are soft or hard say they are soft, and no one contradicts Dr. Price's testimony that if they were shrunk from atrophy, they would be hard.

The verdict for \$10,000.00 is grossly excessive, unless plaintiff's ability to labor and get about has been permanently and seriously impaired, and in view of the tardy development of any symptoms of serious injury, the short time that elapsed between their development and the trial, and the inconclusiveness of the scant evidence of permanency of any of the asserted results of the accident which seemed so trivial at the time, we find ourselves unable to avoid the conviction that under the circumstances, the verdict is so excessive as to indicate passion or prejudice upon the part of the jury. When a verdict for personal injuries is so large that it could be sustained only if the injuries are permanent, there must be positive and satisfactory evidence of permanency.

Illinois Central Ry. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530; *Watson v. Brightwell*, 82 S. W. 454; *L. & N. R. Co. v. Reaume*, 128 Ky. 90, 107 S. W. 290; *Louisville Sou. R. Co. v. Minogue*, 90 Ky. 369; 14 S W 357; *L. & N. R. Co. v. Mattingly*, 38 S. W. 686; *Ky. Wagon Mfg. Co. v. Shake*, 137 Ky. 742, 126 S. W. 1095.

Wherefore the judgment is reversed and the cause remanded for a new trial.

Louisville & Nashville Railroad Company v. Bennett.

(Decided February 28, 1919.)

Appeal from Daviess Circuit Court.

1. **Carriers—Assault by Servant Upon Passenger.**—The law makes a carrier of passengers responsible for the acts of his servant in charge of the passenger, and who for the time being has custody of him, with the implied obligation to exercise the highest degree of diligence and care to transport the passenger safely, and this duty requires that the carrier shall protect the passenger from violence or insults from whatever source they may arise.
2. **Carriers—Assault by Servant Upon Passenger.**—In an action by a passenger against the carrier for an assault committed by the servant of the carrier upon the passenger, the carrier will not be liable if his servant acts only in justifiable self-defense as against an assault committed by the complaining passenger, but no provocation consisting of mere insulting language will justify an assault upon a passenger, nor will such provocation excuse an assault by a passenger upon the servant of a carrier.
3. **Carriers—Duty of Carrier to Protect Passenger—Force That May be Exercised.**—It is the duty of the carrier to protect its passengers from insults and abusive language engaged in by another passenger, and in doing so it may use such force as may be reasonably necessary to arrest or eject the offending passenger, but no more, and if excessive force be employed, and the offending passenger is unjustifiably assaulted and injured, the carrier must respond in damages.
4. **Carriers—Assault by Servant of Carrier—Instructions.**—It is error in such cases to instruct the jury that if the plaintiff used abusive or insulting language intending to insult the carrier's servants, or to provoke an assault, that he thereby violated his contract of carriage and is on that account estopped from asserting his claim for damages, since this would place no limit upon the corrective methods which the carrier in such cases might employ.
5. **Damages—Excessive Damages—Assault Upon Passenger by Servant.**—Where a passenger was struck near the temple by a servant of the carrier who had a pencil in his hand, a part of which was broken off in the wound inflicted and remained there for four months, a large portion of which time plaintiff was prevented from eating solid food and from performing any labor and suffered severe pains for several months, a verdict for \$1,000.00 will not be set aside as excessive.

BROWDER & BROWDER, W. P. SANDIDGE and BENJAMIN D. WARFIELD for appellant.

LOUIS I. IGLEHEART and BEN D. RINGO for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

By this suit the appellee and plaintiff below sought to recover from the appellant and defendant below \$1,000.00 damages resulting from defendant's violation of its contract with plaintiff to safely carry him as a passenger on one of its trains from Owensboro, Kentucky, to Utica, Kentucky, a distance of about eleven miles. The violation alleged was produced by a willful, unlawful and unjustifiable assault made upon plaintiff by defendant's flagman after the former had boarded the car to be transported as indicated, and while the train was waiting in the yards at Owensboro to meet an incoming freight train. Compensation was sought only for loss of time, medical and physicians' bills, and for physical and mental pain suffered because of the assault.

In addition to denying the affirmative allegations of the petition, the answer pleaded (a) boisterous and disorderly conduct on behalf of the defendant and indecent language used by him to such an extent as to alarm and intimidate other passengers on the train, and (b) an assault by him on the flagman, and that the latter did no more than was reasonably necessary, or than appeared to him in the exercise of a reasonable discretion to be necessary, to protect himself from the threatened assault by plaintiff and to protect the other passengers from plaintiff's indecent language and conduct on the train. These defenses were put in issue and upon trial the jury returned a verdict in favor of plaintiff for \$1,000.00, on which judgment was rendered. Defendant's motion for a new trial having been overruled, it prosecutes this appeal.

Three points are very strongly argued before us as grounds for a reversal, they being (1) that the verdict is flagrantly against the evidence; (2) that it is excessive, and (3) that the court erred in refusing to give to the jury instruction number five offered by the defendant at the trial.

Before taking up these grounds for consideration we deem it necessary to say that the law is now well established in this and other courts that out of the relationship of passenger and carrier the law implies a contract by the latter to exercise the highest degree of diligence and care to transport the former with safety and to protect him while the relationship exists from insults and wanton interference of strangers and fellow passengers, and from such insults, interferences or assaults from the

carrier or any of its servants, and for the violation of such implied contract the carrier is liable to the injured passenger for the damages that he might sustain. I. C. R. R. Co. v. Winslow, 119 Ky. 877; Winnegar's Admr. v. Central Passenger Ry. Co., 85 Ky. 547; L. & N. R. R. Co. v. Ballard, *idem.*, 311; Same v. Same, 88 Ky. 159; L. & N. R. R. Co. v. Donaldson, 19 Ky. Law Rep., 1384; Strull v. L. & N. R. R. Co., 25 Ky. Law Rep. 678; White v. South Covington, &c. St. Ry. Co., 150 Ky. 681; Louisville Railway Co. v. Dott, 161 Ky. 759, and L. & N. R. R. Co. v. Bell, 166 Ky. 400.

In the Winnegar case referred to, this court in stating the rule governing the duties of the carrier toward the passenger, said: "It is not material whether the violation consists in putting the passenger off at a point before his destination is reached, or by insulting him, or in assaulting him. They are all plain violations of duty, for which a recovery may be had. . . . The law makes the carrier responsible for the acts of the person in charge of the car, and who for the time has the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely. In *Goddard v. Grand Trunk Railway*, 57 Me. 202, Am. Rep. 39, it was held that the carrier was obliged to protect his passengers from violence or insult, from whatever source it arises. He must use all such reasonable precautions as are necessary for that purpose." This language was quoted with approval in the Winslow case, and we find no case in conflict with it.

While these high duties are imposed by the law upon the carrier, it is also the duty of the passenger to observe reasonable regulations and to deport himself upon the train in a decent and orderly manner. But it does not necessarily follow that if he should fail in any of these respects the carrier or any of his servants having him in charge would be authorized in applying unlimited corrective methods to the passenger as the carrier or his servant might conclude necessary for the occasion. If the passenger becomes so unruly, insulting, boisterous or indecent as to justify it, he might be ejected from the train, since by such conduct he would forfeit his rights as a passenger and the carrier under his duty to other passengers would be authorized in the manner indicated to remove the recalcitrant passenger from the train provided it was attended with no danger to the latter. The

cases further agree that if the carrier or his servant in charge of the passenger is assaulted by the latter and thereby placed in danger or apparent danger of death or great bodily harm, the carrier or his servant in the exercise of the right of self-defense may administer such punishment to the passenger as may be necessary or in the exercise of a reasonable discretion appears to be necessary to avert the danger. But beyond these limits the carrier is not authorized to go without incurring responsibility to the passenger for the injuries sustained. With these rules before us we will as briefly as possible consider the three grounds relied upon for a reversal.

With reference to the (1) contention, the facts are that defendant's train left Owensboro for Utica at about 3:45 p. m. Plaintiff had been in Owensboro since about twelve o'clock that day, the greater portion of which time he had spent in a dental office, where he had seven teeth extracted. According to his testimony, and the witness who was with him throughout the time, he took one drink of liquor before going to the dental office. There was scarcely time to get from the dental office to the depot to catch the train, and plaintiff's companion purchased the tickets while the former boarded the train, entering the smoking compartment which, as well as the ladies' coach, was very much crowded with passengers. There being no vacant seat, plaintiff sat down in the lap of an acquaintance with his feet hanging over the arm of the seat, when the conductor approached him and the other passengers upon that seat requesting their tickets. Plaintiff's companion, who was nearby, handed the tickets to the conductor, but the passenger in whose lap plaintiff was sitting could not get to his ticket, since plaintiff was reclining upon his arm. The conductor requested plaintiff to rise up, which he did, according to the testimony of the conductor, who about that time turned to the other side of the car and began taking up tickets from other passengers, when he heard the flagman, who was standing close by, say to plaintiff, "Keep your hands off of me," when plaintiff replied, "You God dam son of a bitch, do you think you can run over me?" Whereupon, the flagman struck him. The testimony of the flagman on this point is: "Bennett was sitting in two men's laps in one seat and the conductor asked him to get up so the old gentleman could get his ticket out of his pocket and he got up and he told him to

stand out of the seat; there wasn't room enough for the old man to get into his pocket to get his ticket, and he asked him to stand around, and the conductor turned his back taking tickets on the other side of the car and it seemed like he didn't pay any attention to the conductor and I said, 'Stand back so the old man can get his ticket.' The train was crowded. We had a big crowd out of Owensboro, and I caught hold of him and pulled him so the old man could get his ticket out of his pocket and he grabbed hold of him and jerked him around, and I told him not to do it, and finally he grabbed me around the neck and I told him to 'Keep your damn hands off of me,' and young Max Howard said, 'Lorenza, behave yourself; these men haven't got time to fool with you,' and he said this God damn son of a bitch can't run over me, and then I hit him."

Other passengers heard the language attributed to plaintiff by the conductor and flagman, but did not know who spoke it, while plaintiff and his companion say that no such language was used by plaintiff until after he had been assaulted and struck by the flagman.

Plaintiff testified that as he was raising up the flagman took hold of his arm and pulled him out and that he, plaintiff, went forward and in doing so laid his hand against the flagman's breast, who said, "Keep your damn hands off of me;" that at that time the conductor pulled him around and as he did so the flagman struck him.

From this it will be seen that there is but little substantial conflict in the testimony as to what occurred except as to the opprobrious epithet which defendant's witnesses say plaintiff used toward the flagman. Whether he did so or not—even if it were decisive of the case—was a question upon which there was a contrariety of proof, and one for the determination of the jury. While such insulting language might mitigate the assault and perhaps the damages on account of it, it does not furnish complete justification for the assault, even as between individuals sustaining no relationship of passenger and carrier, and *a fortiori* it would not be a justification where such relationship existed.

The case of *White v. South Covington & C. Ry. Co.*, *supra*, was one brought to recover damages for maltreatment of the passenger by the conductor, and defenses similar to those here were relied upon by the defendant. This court, in passing upon the questions raised,

quoted from 6 Cyc 602, saying: "If the servant of a carrier acts only in justifiable self-defense as against an assault by a passenger, the carrier will not be liable; but no provocation consisting in mere insulting language will excuse an assault." Further along in the opinion the case of *B. & O. R. R. Co. v. Barger*, 26 L. R. A. 220, is referred to and relied upon, the court saying that "An assault by the conductor upon a passenger is not excused or the liability of the carrier defeated by the fact that the passenger had used grossly profane and abusive language to the conductor without provocation."

The lick knocked plaintiff about fifteen feet down the aisle, and one witness says that as plaintiff was falling backwards from the force of the stroke, witness saw a knife in his hands. This is denied by plaintiff, and no other witness testified to the fact. There is also contradiction in the testimony as to whether plaintiff at the time he was struck had his hands in his pockets. But the attitude of plaintiff just before and at the time of being struck was necessarily submitted to the jury in the self-defense instruction, and its finding that the flagman was not in any real or apparent danger from the hands of plaintiff is amply supported by the testimony. Furthermore, if plaintiff's conduct and the appearances produced thereby were such as to create the belief on the part of the flagman that he was in danger of bodily harm, he then had the right to use no more force than reasonably appeared to him to be necessary to free himself from the danger. Plaintiff was struck near the left temple, and about two inches of a lead pencil which the flagman had in his hand, broke off in his cheek and was driven next to the cheek bone, and penetrated some two or three inches below the point of entrance. The injury was inflicted on February 2, and the location of the broken pencil was not discovered until about the first of June following. In the meantime the wound had been lanced some seven or eight times and an X-Ray examination made about the first of May failed to reveal the presence or location of the piece of pencil. Plaintiff's pain and suffering was almost constant, and very severe. There were times when he could take no solid food, since he could but partially open his mouth, and could not masticate his food. Even if it be conceded that plaintiff used the insulting language with which he is charged, and that he had his hands in his pockets at the time—both of which

finds contradiction in the testimony—it can not be insisted that these acts on his part merited the severe punishment inflicted.

Much stress is made in brief about language attributed to plaintiff after he had been injured and while going through the train hunting for the flagman, but however opprobrious such language, if any, might have been, it can not heal the prior breach of defendant's contract made by the unjustifiable assault of the flagman. It may have been sufficient cause to authorize, as hereinbefore intimated, the ejection of plaintiff from the train, but it can not be permitted to have the effect of curing a wrong previously committed.

In saying what we have, we would not be understood in the least as condoning any unbecoming conduct or offensive language on the part of a passenger, whereby the quietude and sense of decency of other passengers are offended. We only mean to say that in our opinion the facts of this case did not authorize the character of assault made upon plaintiff by defendant's flagman. At any rate, the jury were authorized to so find, and we do not think their verdict is subject to the criticism of being flagrantly against the evidence, or even against the preponderance of the evidence.

What we have said is sufficient to dispose of the (2) ground relied upon. Plaintiff not only underwent seven or eight operations, but as stated, suffered excruciating pains. His face was greatly swollen for months, accompanied by fever, and the wonder is that with the pencil buried in his face he escaped with so little disastrous consequences. According to his testimony he was wholly disabled from work for a period of three months, and it was with some difficulty that he worked at all. For as much as six weeks he was fed with a spoon, and the supuration from the wound made by the pencil, together with the consequent pain and suffering, kept him from sleeping and required the use of an extra cloth on his pillow at night.

The rule in cases like this is that the fixing of the amount of damages must be left largely with the sound discretion of the jury, and unless the amount returned is so excessive as to strike the mind at first blush as having been returned under the influence of passion or prejudice, the verdict will not be disturbed. Larger verdicts against carriers for violation of their duty to passengers,

where the testimony showed less injuries and the conduct of the carrier or his servant was less aggravating than that of the flagman in this case, have been upheld by this court. *L. & N. R. R. Co. v. Ballard, supra*. Under the circumstances, and the rule, *supra*, by which we are to be governed in cases like this, we can not say that the verdict in this case was excessive.

Under the (3) objection urged against the judgment the instruction offered by defendant which the court declined to give said to the jury:

"The court instructs the jury that if they should believe from the evidence that at the time and place of the alleged injuries complained of the plaintiff, Bennett, used any abusive or insulting language, in the presence of other persons, intending thereby to insult defendant's flagman, Morgan, or with the intention to provoke an assault by said Morgan, then and in that event the plaintiff was guilty of a violation of law, and also violated his contract of carriage with the defendant and is on that account estopped from asserting the claim for damages sued on in this action."

This instruction ignores the limitations which the law places upon the right of a carrier in dealing with recalcitrant and unruly passengers, even if the evidence in this case was sufficient to so characterize plaintiff at the time he was struck by the flagman. Those limitations, as we have seen, go no further than to permit the carrier to eject the passenger, and to use no more force than was necessary to arrest or put him off of the train. The offered instruction would take from a passenger who had been guilty of using abusive or insulting language all rights, and would arm the carrier with the right to inflict upon him such punishment as he or his servants might see proper to administer. And howsoever severe that punishment might be, the passenger would be barred from asserting his claim for damages upon the ground that he was estopped to do so because of his own insulting or abusive conduct. No cases have been cited from this or any other court establishing such a doctrine. On the contrary, as we have seen, such conduct on the part of a passenger furnishes no authority for the infliction of the character of punishment which the plaintiff's witnesses testified he received on the occasion in question. Neither would insulting language from the carrier's servant to the passenger authorize an assault by him upon such servant. *Louisville Ry. Co. v. Frick*, 158 Ky. 450.

The instructions given by the court fully covered the law of this case and completely protected the rights of each litigant.

It is insisted that the rule requiring plaintiff in cases like this to make all reasonable efforts to minimize his damages should have been submitted to the jury under the facts of this case because, as alleged, his wounds were permitted to linger and his suffering prolonged because of the unskillfulness of his physicians in not sooner discovering and extracting the piece of pencil left in his face. The rule of law contended for is well established and should be applied in all cases where the facts authorize it. *I. C. R. R. Co. v. Gheen*, 112 Ky. 695; *L. & N. R. R. Co. v. Reaume*, 128 Ky. 90, and *I. C. R. R. Co. v. Wilkins*, 143 Ky. 572. But in this case nothing appears to show any want of diligence on the part of plaintiff in this regard. He consulted and submitted to the treatment of three different physicians, none of whom is shown to be unskilled in his profession. Nor did the plaintiff know that fact, if it was a fact. Moreover, the latest and most approved test (X-Ray picture) was applied and failed to reveal the location of the pencil. However, if all these objections were removed, defendant could not take advantage of the error, if one, since no instruction was offered presenting this phase of the case.

Perceiving no error prejudicial to the substantial rights of the defendant, the judgment is affirmed.

Harper's Administrator, et al. v. Southern Security Company.

(Decided February 28, 1919.)

Appeal from Carlisle Circuit Court.

Insurance—Accident Insurance—Pleading.—A demurrer was properly sustained to a petition which, as amended, sought a recovery under a limited accident policy, for the death of the insured from an accident alleged to have been sustained while engaged in farming, where the policy made a part of the petition did not insure against loss of life from such an accident, but provided only for the payment of weekly indemnities for loss of time under certain conditions which were not asserted.

JOHN R. EVANS for appellant.

W. B. STANFIELD for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

On August 18, 1916, appellee executed and delivered to Harley Harper, appellant's intestate, an insurance policy which is described in large letters upon both the back and face of the policy as being a "Special Limited Five Dollar Accident and Sickness Policy," by the terms of which it insured the decedent for a term of one year,

" . . . against the effects of bodily injuries caused directly, solely and independently of all other causes by external, violent and accidental means, which bodily injuries or their effects shall not be caused wholly or in part, directly or indirectly by any disease, defect or infirmity, and which shall from the date of the accident result in continuous disability and also against the effects of sickness, as follows:

The company will pay:

SECTION A

For loss of life the principal sum of \$2,500.00. . . . resulting within thirty days from accident solely from such injuries which shall have caused continuous total disability from date of accident to date of loss, but only when such injuries are sustained in the manner specified in section D. clause 1."

Section D.

1. While traveling as a passenger in a place regularly provided for passengers, within any common carrier's public passenger conveyance (animals, aerial machines or conveyances excepted)."

This is the only provision of the policy which provides indemnity for loss of life. In the original petition filed by the appellant, it is stated that the insured "suffered from appendicitis and a complication of other diseases, and therefrom said suffering and attack of said diseases he died," and a recovery is sought for the principal sum of \$2,500.00.

A demurrer was sustained to this petition as was unavoidable, since the policy in clear and explicit terms insures for loss of life only when resulting from an accident incurred while the insured is traveling as a passenger within a common carrier's public passenger conveyance. By an amended petition filed, the plaintiff stated that "while the said Harley Harper, deceased, was actively engaged in farming by actual contact and while operating a disk harrow, while engaged in farming on his farm in Carlisle county, Ky., on the 17th day of Septem-

ber, 1916, he bruised and hurt his right side by falling against the said harrow, thereby injuring his right side, from which he never recovered, and that from day to day after said injury therein complained of, he grew worse until the 29th day of September, 1916, from said wounds, hurts and injuries, appendicitis and other diseases set up, the direct causes of said above injuries, and which said injuries directly caused his death."

It will be seen these allegations come no nearer stating a cause of action under the policy for loss of life than did the original petition, and a demurrer was sustained to the petition as amended, and upon plaintiff's refusal to plead further, his petition was dismissed, from which judgment he has prosecuted this appeal.

It is insisted by counsel for appellant that by the 14th clause of section D, insurance is provided against injuries which accidentally result to the insured "while actively engaged in farming by actual contact with and while operating a threshing, mowing, reaping or binding machine, harrow or plow," and that the allegations of his amended petition were sufficient under this provision to constitute a cause of action, but the trouble with the argument is that learned counsel has overlooked or ignored the fact that for such injuries and their consequences, the policy provides only for the payment of an indemnity of \$12.50 per week for loss of time, and that only "if such injuries shall from the date of accident continue and wholly prevent the insured from attending to any and every kind of business," conditions which he did not affirm, so that clearly the plaintiff failed to state a cause of action for either loss of life or loss of time by the insured, and the court did not err in sustaining the demurrers and dismissing his petition.

Wherefore the judgment is affirmed.

Garman v. Commonwealth.

(Decided February 28, 1919.)

Appeal from Warren Circuit Court.

1. **Criminal Law—Mental Condition of Defendant—Evidence.**—Question of appellant's mental condition having been submitted to the jury under proper instruction, the record examined, the

court finds there is no ground to reverse the judgment of the jury finding appellant guilty.

2. **Criminal Law—Connected Criminal Acts.**—Where several criminal acts committed by the accused are so connected with respect to time and locality as to form an inseparable transaction and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such acts, evidence of same is admissible to prove the whole general plan.
3. **Criminal Law—Evidence—Admonition.**—The admonition of the court as to the admission of testimony relative to the second shooting was proper; even though the language used was inapt it was not prejudicial to the accused.

WRIGHT & McELROY and SIMS, RODES & SIMS for appellant.

CHARLES H. MORRIS, Attorney General, and OVERTON S. HOGAN, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

At the September, 1918, term of the Warren circuit court appellant, A. A. Garman, was convicted of the willful murder of Ed Johnson and his penalty fixed at death.

The grounds for reversal of that judgment urged by counsel for appellant are as follows:

(1) The verdict is flagrantly against the evidence, it being claimed that at the time of the killing plaintiff was of unsound mind and not responsible for his acts or conduct.

(2) Because of error of the court in admitting details of a second shooting on the same day.

(3) Because of the court's error in not properly admonishing the jury as to the admission of the evidence of the second shooting.

1. The question of insanity. About sixteen years before the killing it appears that appellant was thrown from his horse, and was rendered unconscious for some time; that thereafter he was not the same. Instances of his peculiarities we will presently indicate from the testimony.

On the Monday preceding the killing, which took place on Wednesday, August 7, 1918, armed with a pistol and knife, both in a belt and scabbard, with a black bag hung over his shoulders, containing about 160 loads of ammunition, and in his shirt sleeves, appellant went to the court house in Bowling Green and there talked with the deputy jailer. On Tuesday, armed and equipped in like manner as on the previous day, he again visited the

court house, both in the morning and afternoon. On Wednesday morning the killing took place on his farm, the decedent being his tenant. Shortly after the killing he sought shelter in a thicket, a short distance from the scene of the killing, and at this latter place he was later found by members of a party who were hunting for him; before he was captured he shot a member of the posse.

Testifying in his own behalf appellant states that he is 80 years of age. He identified his Winchester rifle, knife and pistol; that for a year preceding the killing, whenever he went out in his buggy, he took his Winchester rifle. To use his own language: "Because an automobile run into me and knocked me out of the buggy and hurt my horse and me too, and I wanted them to keep on their side of the road." He bought the knife because he was expecting to kill a goat, and he purchased the pistol because he thought he could use it if he needed it, and if not there would be no harm done; he was advised he had a right to carry these weapons provided he did not conceal them, and he was always careful that he did not carry them concealed.

He states in detail his visits to the court house and other places on Monday and Tuesday before the killing. He carried his Winchester rifle every time he went to the farm; he states he had smothering spells and that when they would come on him he would get up at night and work his garden by lantern light. He says he has had these ever since the time he was thrown from the horse. He went to his farm on Wednesday morning, and in response to a question from his counsel to tell the jury all about it, from start to finish, he says:

"Well now when I went there Wednesday morning I went to the gate and it was all wired up but not as bad as it had been; well I opened that so I could go in, and I went on to the barn and I had a big wagon and I had tobacco on each side of the barn and had a passway right through the shed and I asked him (referring to his tenant, Johnson) to take the wagon out and he said, 'yes, he might take it out,' and went on to the house, and me and this other fellow was there and we talked a little and I had some steeples and bolts and I took them to my room and come on back, and when I come back I left my horse standing there. Now the barn here you had to go right through the shed and when I went to the house the road went this way to the house, it made a little

crook right here, and while I was going to the house my horse was standing here, and while I was going back I met my horse there picking at the path and I come on and got hold of the horse and turned him around right in front of this shed, and I never looked back or nothing at all, and I went to unhitching him, and when I was unhitching him I stepped in front to undo the backing strap and then I turned as quick as I could and there he was right there and cocked his gun and said, 'I am going to kill you,' and I said, 'I don't want you to do that,' and Igollys he come right on towards the horse's head and I told him I didn't want him to kill me, and I was standing there right there ready for him and he had his gun. I can show you exactly how it was; he had his gun right that way, drawed on me, and Igollys, then he got back of the horse and when he come around the horse that way I shot him right there, for I seen I had it to do or he would kill me." He says he shot him with a Winchester rifle, and his wife "come and hollered and kept hollering and I never said a word to her and she hollered for Harrison, and then for Hays, and she said for them to get a doctor and nobody come and nobody answered her."

He finished unhitching his horse and turned him loose; that later he went to take him to the pasture but could not find him. He passed by the house and came back to the place of the shooting and he thus relates what happened then: "A. Yes, sir, and when I come on back there he was getting his breath pretty hard, and she said, 'He is dying pretty hard,' and I shot him again. Q. Why? A. To keep him from suffering. Q. How did he fall when he was shot the first time? A. He run back four or five steps and fell on his back and had his gun right on his arm and pointing towards me. Q. Did you believe you were doing right the first time you shot him? A. Yes, sir, I did, for I thought if I didn't he would shoot me, for he had threatened me before that; said he would knock me in the head. Q. Did you think you were doing right the second time you shot him? A. Well, Igollys, to get him out of his misery; I seen he was going to die." After this he called a man by the name of Denham and insisted upon his coming over and looking at Johnson.

In response to a question as to where he went after talking to Denham he says: "I come back and looked for

my horse again and couldn't find him. When he left I come back to see if anyone was there but his wife, and I come back then to Hays' to see if they was there, and I just got over there and got me a high place where I could see clear to my house and I set down, and I could see them running in every direction, and one fellow ran right in four feet of me, and I could see them with their guns going that way and yon way, and I was laying there waiting for the sheriff, and I knowed that he would come around, and I was laying down there, and I could show you just how I was laying and he shot me, and I saw him coming and I never said a word, and he never said a word neither, and he ran right up and shot, and just did miss my head, and it went right there, and I couldn't do anything but crook my hand that much, and I shot twice."

John R. Garman, son of the appellant, says he does not think his father's mind has been right since the horse threw him; that he was then unconscious for about 24 hours; that after the accident he always walked and said his head would swim and he would not get on a horse; he was restless at night, and would wake up and get up and walk; go all over the farm; had been seen out on the road at night. He would take nervous spells and would get all torn up and would look like he did not know anything; would mutter and talk to himself, and he says he does not think his father is sane. He admits, however, that his father purchased and sold a great deal of stock; knew how to buy and sell it and make money on it; that they never took steps to have a committee appointed for him, or have any one undertake the transaction of his business. His father owned a good farm which he sold for \$12,000.00. He made a profit on the farm. This was all after the time the horse threw him; his father never did any harm to himself or any one else, but that he would get it into his head, when he had these spells, that some one was going to kill him.

J. R. Turner, a son-in-law, says at times he "pronounced" him to be of unsound mind. It seemed that his mind got scattered and he complained of his head. He has seen him out on the road at night; thinks appellant got a pretty good price for his farm. He always transacted his own business; bought and sold stock and at times he would get unnerved; that he was nervous and high tempered.

J. D. Whittaker, a merchant at Livermore, saw appellant about a week before the killing; sold him his pistol; appellant said he owned a farm out from Bowling Green, and was out quite often after night and wanted protection, witness saying he had always been of a nervous disposition; complained of his head, said it seemed like some one was after him and was wanting to kill him. The witness told him it was merely his imagination. Witness had seen him on the road at night; appellant said he was restless; thinks he got a good price for his farm; appellant generally knew what he wanted, went after it and got it.

Mrs. Smith, appellant's daughter, testified to the same general effect as the others, as to her father's restlessness after being thrown from the horse and thinking some one was going to kill him.

Mrs. J. R. Turner, a daughter, thinks her father's mind was not sound; always complained of his head since the accident from the horse, and was nervous and did not sleep well; has known him to get up and sit for hours with a gun in his hands; says her brother has been in the asylum twice. Appellant had a cousin who was of unsound mind and was in the asylum at different times.

J. P. Huggard, undertaker, at Livermore, says he would not have considered him a man of sound mind since he has known him, which has been twenty or twenty-one years; saw him a week before the killing. Appellant purchased a coffin from him and talked about it a number of times, saying that something might happen to him, and thought some one was going to kill him, and he said, "I won't be living Saturday night; they are going to kill me."

R. A. Seay, a neighbor in Bowling Green, thinks that appellant is a little off, and judges this from his actions; has seen him work in his garden at night; never saw him with a gun or rifle at night. He carried the rifle since the automobile accident; told him about purchasing the coffin; never reported to any one that he thought the appellant was crazy.

The appellant did not introduce any medical testimony as to the condition of his mind, the foregoing being the only witnesses introduced in his behalf, and we have endeavored to give the gist of their testimony.

The Commonwealth introduced a number of witnesses who were personally acquainted with the appellant. The

President of Ogden College, at Bowling Green, said that he had seen him frequently and that he was quiet and friendly; never saw him in any other attitude or spirit.

Lem Howell, deputy jailer, talked with appellant on Monday and Tuesday preceding the killing, and that he was complaining about the gate on the farm being closed and he wanted it opened; that he had known appellant three or four years; observed him frequently, and he had never seen anything to indicate that he was of unsound mind.

T. P. Smith, a constable, had known appellant for several years; had been in conversation with him and as far as he could see he was of sound mind.

B. F. Wallace, an attorney, had defended appellant in two or three cases. Had observed him around Bowling Green frequently; considered him a man of sound mind and strong will power; his business dealings with him were about six or seven years before the killing.

J. W. Hendricks, city assessor, talked with appellant about his property when he would get his list. When asked the question as to whether or not he acted in a rational way the witness said: "Yes, sir, except that he wanted to put it as low as possible."

Austin Claypool, jailer of Warren county, has known appellant for seven or eight years; never had a conversation with him except three or four times before the killing; talked to him eight or twelve times a day since then and appellant always talked to him in a rational way; thinks he is of sound mind.

W. C. Hall, acting chief of police, has known appellant for seven years; had several conversations with him in the last three months preceding August 7; never saw anything to indicate that he was of unsound mind.

Dr. Burnett Wright is the jail physician and the only doctor who testified in the case. He did not know appellant until he came to jail; that he had treated his wound about half a dozen times; that in his conversation with him he did not see anything to indicate appellant was of unsound mind; from his observation he thinks he is of sound mind.

This, in substance, is the testimony as to the condition of appellant's mind. The testimony of appellant himself does not read like that of an insane man; the recitation of events leading up to the killing, and what hap-

pened thereafter is clearly given and with remarkable detail and accuracy.

The question of appellant's mental condition was submitted to the jury under proper instructions, and no complaint is made of the instructions. Under this state of the record, viewed in the light of the testimony, the court properly submitted this question for the consideration of the jury, and we do not feel authorized to set aside the verdict as being contrary to the evidence, as contended by appellant's counsel, and unless we could so state this court is without power to disturb the verdict.

2. Admission of incompetent testimony. After Johnson had been shot a posse was formed and started in pursuit of the appellant. Carl Benson and Will Hendricks were two of the first to find him. The testimony of Hendricks is thus stated in narrative form by counsel for appellant, adhering as much as possible to the phrases used by the witness:

"We found him at the south end of them woods, in a pretty bad thicket. There was small undergrowth and briars and bushes and he was lying down in the edge of that thicket. I seen him, but he saw me first. I heard a noise in the bushes and I couldn't see where he was at, and I took my hand and parted the bushes, and saw it was him, and I saw he was making rapid efforts to shoot me. He was facing the other way when I looked in. He was scrambling and turning and raising his gun, and I saw he was going to shoot me and I didn't have time to do anything—to handle my gun, or anything, for the bushes, and I sprang on him and he shot me in the right arm and then through the two fingers, and all I could do I held him down and held the gun on him until these fellows came to me. He didn't say a word; he was just straining and struggling and trying to get that gun or knife or something. He shot me with the revolver. Neither of us said anything to the other. He was just groaning and struggling to use that gun. He saw me first and was rising and turning when I first saw him, as fast as he could, on his hands and knees like. He was on his knees when I got to him. There was no part of his body on the ground when he done the shooting. He hit this arm about the time I got to him or a second or two before. I bore him down to the ground and grabbed his gun. He had in his hand that revolver."

The testimony of Carl Benson is thus summed up by counsel: "I noticed Mr. Hendricks come down just inside the fence, towards the fence, about fifteen feet from me, when I saw him start and draw his rifle up and before he could fire there came two shots as fast as they could be fired and he just jumped then into the thicket and commenced calling for help, and Professor Clark started towards him, and as we came into the thicket Garman was lying on the ground and Hendricks partially over him, and Mr. Gray grabbed Garman's left arm and in getting hold of Mr. Garman I had my knee against his right shoulder, and Hendricks said, 'Look out for his pistol,' and Garman had his pistol in his right hand. He was then on his back with his legs doubled under him, and just as he threw his arm down he discharged, and as we lifted him up his trousers were still on fire."

It is contended that this was prejudicial error.

In Roberson's Criminal Law and Procedure, sec. 242, the author states: "So the flight or concealment of the accused after the commission of the homicide, and the action of the officers in seeking to arrest him, may be shown as circumstances furnishing a presumption of guilt; but it is competent for the accused to explain his flight, as, for instance, the apprehension of violence, or prove the causes which may have influenced him to fly." The same author, sec. 965, says: "Not only the confessions and declarations, but also the acts, conduct and appearance, of a defendant, either before or after the commission of the alleged offense, though not part of the *res gestae*, are admissible evidence against him, as indicative of the intent and motive which actuated him in the transaction with which he is charged. Thus, proof is admissible that the defendant, after the commission of the crime, fled or concealed himself as though to elude justice, or endeavored to avoid arrest, or escaped or attempted escape from custody after arrest, or was guilty of any other conduct inconsistent with his innocence."

In Basham v. Commonwealth, 87 Ky. 440, the court says that it is competent for the Commonwealth to prove that the accused, after committing the act or having been accused of it, fled or concealed himself or was guilty of any other conduct inconsistent with his innocence. This ruling is approved in Saylor v. Commonwealth, 22 Rep. 472.

Counsel relies upon the case of *Shepherd v. Commonwealth*, 27 Rep. 376, in support of their contention, but the testimony in that case related to crimes in no wise immediately connected with the offense for which the accused was being tried. And along the same line the case of *Morris v. Commonwealth*, 129 Ky. 294, referred to by appellant, in which it will be found that the court while admitting that as a general rule it is not often permissible, in order to show intent, to introduce evidence of other and distinct crimes, yet admits that where said crimes are so interwoven with the crime under trial that it cannot well be separated from it in the introduction of relevant and competent evidence, then it is admissible, and immediately following the quotation in appellant's brief the court states: "The exceptions to the general rule against the admissibility of evidence of other and distinct offenses are in a general way stated as follows in Underhill's *Work on Criminal Evidence*, p. 107: '(1) If several criminal acts committed by the person on trial are so connected with respect to time and locality that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. (2) When the commission of the act charged in the indictment is practically admitted by the accused, who seeks to avoid criminal responsibility therefor by relying on a lack of intent or want of guilty knowledge, evidence of the commission by him of similar independent offenses before or after that upon which he is being tried, and having no apparent connection therewith, is admissible to prove such intent or knowledge.' "

The testimony of Hendricks and Benson recited details so intimately connected with the killing of Johnson that we do not see how the court could well have eliminated it; nor can we say the court committed prejudicial error in the admission of this testimony.

The appellant had sought to evade his pursuers, and had picked out, as he says, "a high place where I could see clear to my house," and we believe the evidence as to the second shooting was competent as being so connected with respect to the time and locality of the killing of Johnson as to form an inseparable transaction, and also as being connected with the flight and capture of appellant.

3. Did the court properly admonish the jury as to the purpose of the introduction of this testimony? While the witness Hendricks was testifying counsel for defendant interposed an objection to his testimony, and the court gave this admonition: "The jury will not consider, of course, anything in connection with this man but the attitude." It is claimed this admonition was meaningless and did not enable the jury to get any well defined or proper idea of what was intended or meant.

Perhaps the language used by the court was not as explicit as it could have been, and yet we do not think that the language used was prejudicial. The word attitude, as defined in Webster's International Dictionary is, "Position as indicating action, feeling or mood; the object of an attitude is to set forth or exhibit some internal feeling; as an attitude of wonder, admiration or grief, etc."

It is usual in admonishing juries relative to testimony of this nature to tell them the testimony is not admitted to show accused guilty of the crime for which he is being tried, but only competent for the purpose of establishing some other fact pertinent to the trial. The lower court did tell the jury that the only thing they could consider in connection with the witness Hendricks was the attitude. In other words, that no part of his testimony was competent as showing the guilt or innocence of the appellant, and if the use of the word "attitude" was inapt the jury could not have misunderstood the other part of the admonition, viz.: that they were not to consider anything else. We do not think appellant was prejudiced in any way by the admonition.

This is an unusual case, a man 80 years of age given the death penalty. This court is one of appellate jurisdiction. Under sec. 340 of the Criminal Code it is provided: "A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby."

But upon a consideration of the whole case we are of the opinion that the substantial rights of appellant have not been prejudiced and therefore we are constrained to order an affirmance of the judgment below.

Should the sheriff be satisfied that there are reasonable grounds for believing appellant insane he is auth-

orized to summon a jury to inquire into this question, and if the inquisition find him insane, this will suspend the execution of the judgment. Criminal Code, secs. 295, 296.

The whole court sitting.

F. T. Justice & Company v. Rogers, et al.

(Decided January 31, 1919.)

Appeal from Fayette Circuit Court.

1. **Pleading—Amendments.**—The court having overruled the demurrer to plaintiff's petition, seeking damages for breach of contract, and upon final submission having set aside the order and sustained the demurrer an amendment tendered by the plaintiff on the day the judgment was rendered should have been filed.
2. **Pleading—Amendments.**—Under section 134 of the Civil Code the court may at any time, in furtherance of justice, permit pleadings to be filed for the purpose of correcting mistakes.
3. **Equity—Transfer to Equity.**—Plaintiff's motion to set aside the submission and to file a tendered amendment and transfer the case to the equity side of the docket should have been sustained; said motion having been made on the day the court sustained the demurrer to the petition, the court, under a previous ruling, having overruled the demurrer to the petition.

FORMAN & FORMAN for appellant.

WALLACE & HARRISS for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Reversing as to Jackson D. Rogers; affirming as to Jos. Rogers.

Defendants (appellees) owned a lot of land in Lexington. Plaintiff (appellant), a corporation, was desirous of purchasing the lot for yard purposes. As a result of certain negotiations between the defendant, Jackson D. Rogers, and F. T. Justice, president of the plaintiff company, they entered into the following contract:

“Lexington, Ky., March 28, 1916.

“This agreement entered into by and between Jackson Rogers and Joseph Rogers, of Versailles, Kentucky, parties of the first part, and F. T. Justice & Company, a corporation, of Lexington, Kentucky, parties of the second part,

"Witnesseth: That for and in consideration of the sum of one dollar paid by second party to said first party, the receipt of which is hereby acknowledged, and the further consideration of eleven thousand, two hundred and twenty seven and 31/100 (\$11,227.31) dollars to be paid by second party to said first party on May 1st, 1916, or otherwise this contract is null and void, with interest at five per cent per annum from date until paid, the said first party agrees to make F. T. Justice & Company a deed for the following described property, a lot of land on Walton avenue, and the C. & O. R. R., being 11¼ acres, more or less.

"Witness this day in duplicate,

"JACKSON D. ROGERS,
"F. T. JUSTICE & COMPANY,
"F. T. JUSTICE, *President*."

On April 29, 1916, defendants conveyed the lot in question to Shepard and others for a consideration in excess of that referred to in the contract. Defendants having thus made impossible the performance of the contract on their part, plaintiff brought this suit seeking damages in the sum of \$3,711.94, for breach of the contract, being the difference between the amount specified in the contract and the amount of sale to Shepard and others.

The petition alleged a tender by plaintiff before May 1, 1916, and of the willingness on its part at all times to comply with the terms of the contract. A demurrer to the petition having been overruled, defendants filed separate answers, setting up various defenses. Plaintiff filed a demurrer to the different paragraphs of the answer.

In the third paragraph of the answer is this allegation: "That it was expressly provided in said contract that if the plaintiff did not pay the said sum of \$11,227.31 on May 1, 1916, then that the said contract should be null and void, and under and according to the terms and conditions of said contract it was optional with the plaintiff whether it did or did not pay said sum or any part thereof. . . ."

The court overruled the demurrer to the first and fourth paragraphs of the answer, but as to the second and third paragraphs the ruling was passed and ex-

pressly reserved by the court for determination upon the final submission.

A reply was filed making up the issues, proof taken and the cause submitted to the court without the intervention of a jury.

In the opinion and judgment rendered the order overruling the demurrer to the petition was set aside, the demurrer sustained and the petition dismissed. The court, in the concluding paragraph of the opinion, saying: "Having reached this conclusion, after a most careful examination of the whole case, it would seem the court ought to have sustained the demurrer to the petition." Proper exceptions were taken and reserved; motion and grounds for a new trial filed and overruled, and on the same day the opinion was rendered, and judgment entered pursuant thereto, plaintiff tendered an amended petition for the purpose of making the pleadings conform to the proof, and alleging that by mutual mistake on the part of the parties the contract copied in the original petition did not contain the real agreement between the parties, and moved the court to transfer the cause from the ordinary to the equity side of the docket. This motion was overruled.

Inasmuch as we have reached the conclusion that the case should be reversed because of the court's refusal to permit the amendment to be filed it will be unnecessary for us to discuss the many points raised by counsel in this interesting case.

That the lower court reluctantly entered a judgment dismissing the petition is manifest from the language used. For example we quote from said opinion as follows:

"On the whole it is a hard case, one that any court might feel constrained to determine upon what appears to have been the clear purpose and intention of the contracting parties, but inasmuch as the defenses made are defenses which the defendants have a perfect right to make, and are defenses which the courts recognize as legal and valid, the court, even if reluctantly, feels compelled to direct a judgment for the defendants."

The lower court held that the contract as signed was unilateral, and therefore the plaintiff could not recover damages for any breach thereof. This view was based upon the following words inserted in the contract by the father of the appellees: "Otherwise this agreement is null and void."

John O. Rogers, the father, states that he inserted these words for the purpose of binding Justice & Company, but the lower court held it had just the opposite effect. It was the evident intention of appellant, Jackson Rogers, to make a binding contract for the sale of this property. Jos. Rogers, his brother and joint owner, refused to sign the contract. Jackson Rogers did everything in his power to get his brother to sign; he even requested his sister to endeavor to persuade him so to do. He seems to have been not only willing but anxious to carry out the contract as made and would have done so but from the fact that he was advised it might in some way involve his brother or bring about litigation.

Section 94 of the Civil Code provides: "If the court sustain the demurrer, the party may amend the pleading, with leave of court,"

Section 134 of the Code provides that the court may at any time, in furtherance of justice, permit a pleading to be amended by correcting a mistake in the name of a party, or a mistake in any other respect or by inserting other allegations material to the case, or if the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

This court has held in a number of cases that reformation of a contract will be decreed when sufficient reasons are given therefor, if by so doing substantial justice will be done to all parties. Especially is this true where it is alleged or proved that the contract as drawn does not express the real intention of the parties, or wherein there has been a mutual mistake of the parties. *Cecil v. Livestock Ins. Co.*, 165 Ky. 750; *Logan v. Langan*, 145 Ky. 599. In this latter case, in quoting from *Pomeroy's Code Remedies*, sec. 93, the court thus states:

"In an action brought to recover damages for the breach of covenants contained in a deed of conveyance the defendant may set up, as an equitable defense, a mistake in the instrument which should be corrected, as for example, in such an action on a covenant against incumbrances, the alleged breach being an outstanding mortgage, the defendant may show the original agreement to except such mortgage from the operation of the covenant, and that by mistake the exception was omitted."

See also *East Jellico Coal Co. v. Carter*, 30 Rep. 174.

The mistake must be mutual to authorize a reformation. That the mistake in the present case was a mutual one is apparent from the testimony of Jackson Rogers and his father, as well as that of the president of the appellant company. Their endeavor was to make a binding contract. When the demurrer to the petition was overruled the court, in effect, ruled that plaintiff was entitled to recover on the contract sued on; and the plaintiff had a right to rely on this fact.

The court expressly withheld its decision on plaintiff's demurrer to the third paragraph of the answer; thus, in effect, confirming the previous ruling that the contract was binding. Certainly plaintiff was not called upon to tender an amendment at that time. After proof had been taken, the cause submitted and the opinion delivered then, for the first time, was the plaintiff apprised of the fact that in the judgment of the court the contract sued on lacked mutuality, or was unilateral, and no recovery could be had thereunder.

In *Ashbrooke v. Roberts*, etc., 82 Ky. 298, the court thus states: "The provision of the Code upon the subject being imperative, the amended answer was defective; but the court had in effect overruled a demurrer to it by permitting it to be filed, although objected to by the appellant.

"It had thereby, in substance, said to the party that his pleading was sufficient, and yet without the least intimation to him, so far as is shown by the record, that the court had changed its opinion, it at the same term, in a final judgment, rejected it, and thereby deprived the party of any opportunity to amend.

"Such a practice can not be sanctioned, as it would defeat instead of promote justice, the attainment of which is the object of the Code and all law.

"The court, by its own error, misleads the party and creates the belief in his mind that his pleading is sufficient, and then without affording him an opportunity to amend, the cause is submitted upon the motion of the adverse party and a final judgment rendered against him, because the pleading which the court has just said was sufficient, is in fact defective."

Counsel for plaintiff acted as promptly as they could, and as soon as the court for the first time intimated that the contract was not binding, they tendered

an amended petition seeking reformation of the contract. The court should have permitted plaintiff to file the tendered amendment, with the right to the parties to file such further pleadings or motions, and take such proof as necessary thereafter.

There is no evidence that Jackson Rogers had any right or authority to bind his brother Jos. Rogers. The judgment as to Jos. Rogers is affirmed, and as to Jackson Rogers reversed for further proceedings consistent with the opinion.

Bushart v. County of Fulton.

(Decided March 4, 1919.)

Appeal from Fulton Circuit Court.

1. Eminent Domain—Taking Private Property for Public Use—Compensation.—Under the provisions of the Kentucky Constitution, Bill of Rights, section 13, forbidding the taking of private property for public use without the consent of the owner, "and without just compensation previously made to him," which inhibition section 242, Constitution, extends to the injuring or destroying of property as well as the taking thereof, a county court is without power to cause a public road to be opened upon the land of the owner without just compensation, paid him before the road is opened and before depriving him of the possession of the land for that purpose. And this is so, although the necessity for the road and its establishment may have been determined, and the amount of the damages due the owner by way of compensation for the taking of the land for the road fixed and directed to be paid, by the judgment of the county court in the manner prescribed by the statute on that subject.
2. Eminent Domain—Taking Private Property for Public Use—Compensation.—A judgment of the county court fixing the compensation of the landowner in such case and ordering it paid, is not a sufficient compliance with the requirements of the Constitution. It must be paid or a tender of it legally made to the owner, before his land can be taken for the road.

HESTER & WESTER for appellant.

DEE McNEEL for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

In this action, brought by the appellant, I. M. Bushart, against the appellee, County of Fulton, the former sought

to recover of the latter \$850.00 damages for its alleged wrongful act in causing to be opened across his farm a public road thirty feet in width. Appellee filed a general demurrer to the petition which the circuit court sustained. Excepting to this ruling the appellant filed an amended petition, in which it was, in substance, alleged that the county court of Fulton county, on the petition of five resident landowners, filed for the opening of the road, appointed commissioners to report upon the matter and to assess the damages that would result to appellant therefrom, who reported in favor of the opening of the road and that they had assessed the damages due him at \$180.00, which report was duly confirmed and an order entered of record establishing the road as reported and directing that it be opened; that it was thereafter opened as ordered; and that by another order then or later duly entered of record, an overseer was appointed to take charge of the road and a boundary of hands designated to maintain it. It was further alleged that the county court, by its judgment, allowed appellant the \$180.00 damages assessed and reported in his favor by the commissioners for the appropriation of his land for the road and consequent damages, but that it caused the road to be opened without paying him the amount of such damages. Appellee insisted upon its demurrer to the petition as amended and the circuit court again sustained it, to which appellant excepted, and, following his refusal to plead further, the court dismissed the action, and in so doing awarded appellee its costs. Appellant complains of the judgment entered in conformity to the several rulings mentioned; hence this appeal.

A county is but a subdivision of the state, created by law to aid in securing good government and the welfare of the people within its boundaries; and the county court is an auxiliary to the same end. While that court has numerous powers they are, after all, limited by law to the performance of certain designated judicial and ministerial duties of a public or governmental nature. Among these are certain powers with respect to the public roads of the county, which were formerly exercised by the county court alone, but are now exercised by that court in part, and in part by the fiscal court of the county.

As, ordinarily, a county cannot be sued for a tort committed by persons assuming to act for it, and the indefinite allegations of the original petition in charging

the appropriation of appellant's land for the road by agents of Fulton county, failed to make it plain that the act was not legally authorized by the county through its constituted authorities, it did not state a cause of action against the county, therefore the action of the trial court in sustaining the demurrer to it was not error.

As it is alleged in the amended petition that the road in question was opened on the petition of five resident landowners, as was required by the statute in force before the enactment, in 1914, of the present law, we must assume that the county court had entire control of the matter and, therefore, jurisdiction to render the judgment. No objection is made by the petition as amended to the validity of the judgment establishing the road. The only complaint made therein is that the amount of damages it awarded appellant was not paid him before his land was taken for the road, or at all; and that the failure of appellee to so pay the same or cause it to be paid, rendered the judgment unenforceable and the taking of his land for the road a trespass. If this contention is sound, the demurrer to the petition as amended should have been overruled; and this question will next be considered and determined.

The people of Kentucky have so far adopted four constitutions, under which its existence as a sovereign state has successively been maintained; the present constitution being the fourth. In each of these instruments will be found a declaratory statement, styled in the third and fourth the "Bill of Rights," enumerating certain rights, denominated "inherent and inalienable," which are guaranteed to the people of the state. Two of these rights are thus set forth in one and the same clause: "No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." This clause, in identical language, appears in section 12 of the first and second Constitutions, section 14 of the third Constitution, and section 13 of the fourth or present Constitution. It is only so much of the section as relates to the taking of property that we are now dealing with.

The present Constitution also contains, not in its Bill of Rights, but under the title "general provisions," section 242, this further declaration respecting the property

rights of the citizen: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual, before such injury or destruction. The general assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall in all cases be determined by a jury according to the course of the common law."

It will at once be seen that this section introduces an element of compensation not included in section 13, Bill of Rights, which goes no further than to compel compensation to the citizen for the taking of his property, before such taking; whereas section 242 requires him to be compensated for any material injury to or the destruction of his property, without an actual taking thereof. In several cases we have held that a city or county is liable in damages to the owner of property abutting a street or highway, not only for the taking, but for injury to or the destruction of such property by the excavation of a street or cutting down of a county road. *Pickerell v. City of Louisville*, 125 Ky. 213; *Barfield v. Gleason*, 111 Ky. 491; *R. & L. Turnpike Co. v. Madison County*, 114 Ky. 351; *Henderson v. City*, 132 Ky. 390; *Cassell v. Board of Council*, 134 Ky. 103; *Ewing v. City*, 140 Ky. 726; *Layman v. Beeler*, 113 Ky. 221; *Moore v. Lawrence*, 143 Ky. 448. We have also held in numerous cases that a railroad company is liable in damages in an action by the owner for injury to his abutting property by the construction and operation of the railroad; or by obstructing and diverting the flow of water causing it to flood and injure the property. *Stein v. C. & O. R. Co.*, 132 Ky. 322; *C. & O. R. Co. v. Blankenship*, 158 Ky. 270; *C. & O. R. Co. v. May*, 157 Ky. 208.

It is manifest that section 242 does not conflict with section 13 of the Bill of Rights; for both sections require that the owner shall be compensated in money before his property is taken. It is only in case of injury to or destruction of the property unattended by an actual taking, that section 242 allows the compensation to be

paid or secured at the election of the corporation or individual before such injury or destruction is caused. But as we understand them neither section 242 nor section 13 permits the actual taking of the property without the payment or tender of the compensation fixed by the judgment in the condemnation proceedings, before taking possession of it. In other words, there is nothing in section 242 or any other provision of the present Constitution that changes the rule obtaining under the previous Constitutions which required the payment to the owners, in advance of the taking, the value of his land.

In *Carrico, etc. v. Colvin, etc.*, 92 Ky. 342. we held that the owner of land condemned for a public road cannot be deprived of the possession until the value of the land has been paid to him, and that the judgment of the county court fixing the compensation and ordering it to be paid to him, is not equivalent to an actual payment and does not deprive the owner of the right to the possession. It appears from the opinion that the judgment of the county court confirmed the report of the viewers recommending the opening of the road, adopted the verdict of the jury assessing the damages to the appellant for the taking of his land, and entered judgment allowing appellant the damages so assessed and establishing the road.

On appeal to the circuit court the judgment of the county court was affirmed, but on the appeal to this court the judgment of the circuit court was reversed, in so far as it directed the taking possession of the appellant's land and opening of the road, previous to the payment of the damages awarded. In the opinion it is in part said:

"The question is, could the appellant's land be taken from his possession for public road purposes without its value having been previously paid to him? Section 14, article 13, of the old Constitution, under which this proceeding was had provided that no man's property should be taken or applied to public use without just compensation being previously made to him. This court, in the case of *Covington Short Route Transfer Railway Co. v. Piel*, 87 Ky. 267, decided that where property was condemned for the use of a railroad corporation it could not be taken from the possession and control of the owner and vested in the corporation without his being previously paid in money for the land. But it is said that this case is unlike that, because in this case the prop-

erty is taken for other purposes, and the pledge of the county, through its authorities, for its payment should be regarded as equivalent to an actual payment previous to the taking of the property, and *Gashweller v. Mackelvoy*, 1 Mar. 84, is relied upon as an authority sustaining that view. But the *Covington Short Route Transfer* case disapproves that case, and we, upon further reflection, concur in the disapproval. The provisions of the Constitution, *supra*, make no exception in favor of the state or its subdivisions so far as the compensation for the property taken is concerned. It was intended by this provision to allow, if necessary, private property to be taken for public use against the will of the owner, and to pay him for it according to the value put upon it by others if he and the taker did not agree on the value, etc., but to protect him as fully as possible in consequence of the exercise of this arbitrary power, it was provided that he should be compensated for the property previous to its being taken from him. Now a promise of compensation, however solemnly made, is not an actual compensation nor its equivalent. Is the judgment of the county court awarding the appellee the value of the land taken anything more than that the other shall pay the amount of the judgment? We think not. The other authorities may refuse to make the levy or payment, and the appellant would be compelled to resort to legal proceedings to enforce the judgment which might be by another court declared void, etc. So the judgment of the county court fixing the amount of compensation and ordering its payment is not an actual payment in money nor equivalent to such payment."

Kentucky Statutes, section 839, relating to the exercise of the right of eminent domain by railroad companies, requires the payment to the landowner by the railroad company of the compensation awarded him for the land by the judgment of the county court, before taking possession of it, but provides that if the railroad company would take an appeal from the judgment of the county court it must in order to entitle it to the possession of the land, in addition to executing an appeal bond, pay into court the damages assessed and all costs. To substantially the same effect is the law regarding the appropriation of land privately owned for a public road, as found in Ky. Stats., section 4302, except that by the latter section it is provided that after concluding the pro-

ceedings for acquiring the land for the road and ascertaining the compensation, it shall be at the option of the county court to pay it or abandon the undertaking to establish the road. If, however, it decides to pay the compensation, the fiscal court of the county is required to include in its next levy an amount sufficient therefor. If the proposed road be one leading from a public road, the county court may refuse to undertake its establishment or abandon it, unless the petitioner for the road or some one for him, shall deposit with the court a sufficient sum to pay all damages and costs sustained by reason of the establishment of the road.

In *Chicago, St. L. & N. O. R. R. Co. v. Sullivan*, 24 R. 860, we had before us the question here at issue. The railroad company instituted in the Ballard county court the proceedings authorized by section 839 Ky. Stats. for condemning a strip of land belonging to Sullivan upon which to construct a roadbed. In the proceedings the county court allowed the latter \$3,000.00 as the damages that would result to him from the taking of his land by the railroad company. By direction of the judgment the railroad company was permitted in taking an appeal to the circuit court to pay the amount of the damages awarded Sullivan to the clerk of the county court, instead of to Sullivan. Following payment of the damages to the clerk the railroad company prosecuted the appeal to the circuit court and attempted to take possession of the land, but was resisted by Sullivan. It thereupon instituted suit and obtained an injunction to restrain Sullivan from interfering with its right to take such possession. The injunction was dissolved by the circuit court, following which the railroad company entered a motion before the Hon. A. R. Burnham, then a judge of the Court of Appeals, to reinstate it. The whole court sat with Judge Burnham on the hearing of the motion, which he overruled, thereby refusing to reinstate the injunction, in which ruling the other judges concurred.

In support of the motion to reinstate the injunction it was argued that section 242, Constitution, is complied with by either paying the compensation to the owner for the land or securing it to be paid; and that the payment to the clerk of the county court of the damages awarded the landowner by the judgment of the court, as directed by its terms, was a proper method of securing the owner in its payment, which entitled the railroad company to

take possession of the land condemned for its road bed without awaiting the decision of the appeal pending in the circuit court. The court, however, found no merit in this contention and rejected it holding that the old rule prevailing under the previous Constitutions requiring the payment or tender of the money to the owner before taking possession of the land has not been changed by section 242 of the present Constitution and that the payment of the money to the clerk by the railroad company was not equivalent to a tender of the money to the owner of the land. In the opinion it is in part said: "This section (242) is not in conflict with section 13 of the Bill of Rights, where the property is actually taken. Both sections require that the private owner shall be compensated in money before such taking. Section 242 does provide that in case of injury or destruction of property unaccompanied by the actual taking, that the compensation may either be paid or secured at the election of the corporation or individual before such injury or destruction. But there is a manifest distinction between taking of property and its incidental injury or destruction. In the latter cases it is often impossible to determine in advance the extent of such injury; and in this state of case the law very properly provides that such damages may be secured until they are definitely ascertained. We are fortified in our view of this matter by the very elaborate discussion of section 242 of the constitutional convention, where its purpose and effect were discussed in detail by many of the most distinguished members of the convention, and an avowal was made by the chairman of the committee who reported the section, that the purpose was to make a distinction between the taking and injury of property, and that there was no purpose to change the law as declared in the cases cited, *supra* (Covington S. R. R. Transfer Co. v. Piel, 87 Ky. 267; Asher v. L. & N. R. R. Co., 87 Ky. 391; Carrico, etc. v. Colvin, 92 Ky. 342). Indeed to do so would produce an irreconcilable conflict between section 13 of the Bill of Rights and section 242. We are inclined to the opinion that it was the intention of the legislature, by the provisions authorizing the payment into court of the damages assessed, to provide an easy way to make a tender to the defendant, and that such payment into court was in reality a payment to the defendant; but as the statute is not perfectly clear on this point, and has not been construed by the Court of Ap-

peals, I feel constrained to adhere to the old rule, and require an actual tender in money before the company is entitled to the possession of the land. But I entertain no doubt, however, that upon the payment or tender to the defendant the railroad company is entitled to the immediate possession of the land condemned, as fully as if the title had been conveyed to it, even if the defendant elected to prosecute an appeal." . . .

In speaking of so much of section 839, Ky. Stats., as allows an appeal in condemnation proceedings the opinion further says: "Under this statute the railroad company can prosecute an appeal to the circuit court for the purpose of reducing the amount of damages awarded to the defendant notwithstanding the previous payments, and the defendant is also given the right of appeal notwithstanding he may have accepted the compensation awarded in the county court proceedings. I am aware that this is a change of the common law rule that a party who has recovered a judgment upon a claim which is indivisible, and collected it, cannot maintain an appeal against the objection of the judgment debtor upon the ground that he had not recovered enough. This rule has been abrogated in appeals to this court by the amendment of 1888 to section 757 of the Civil Code, and in my opinion the legislature intended also to change this rule in cases of this character, bonds being required to the end that the successful party in the trial *de novo* in the circuit court might be secured in the increase or decrease, as the case may be, of the judgment of the county court. It follows from these views that the payment by the railroad company to the county court clerk was not equivalent to tender of the money to the defendant, and until they have done so they are not entitled to take possession of the land in controversy."

The admirable reasons advanced by the writer of the opinion in support of its conclusions seem to us unanswerable; moreover, the opinion has since been followed and its conclusions approved in the case of *Hamilton v. Maysville & Big Sandy R. R. Co.*, 27 R. 215, although with different results; for in the latter case it was held that as the owner of the land condemned for the use of the railroad company was present when the damages awarded and all costs were paid in court by the company and then, and following, such deposit of it, announced in open court her refusal to accept it, such refusal obviated or

excused a formal tender of the amount due for the loss of the land and, under the circumstances, entitled the railroad company to the immediate possession of it. On this subject we said:

"As to the proposition of tender, it is sufficient to say that a tender in money is excused when the party to whom it should be made declares he will not accept it (*Dorsey v. Barbee*, Litt. Sel. Case 204). In the case at bar it appears without contradiction that appellant announced in open court she would not accept the money, and it would have been futile and unnecessary to do otherwise than to deposit the money with the court, as was done in this case."

In a yet more recent case, *Beckham v. Slayden*, 32 R. 944, it was held that a judgment in condemnation proceedings, fixing the compensation and ordering it paid, is not equivalent to an actual payment, so as to deprive the owner of his right of possession.

The principles and practice controlling a condemnation proceeding instituted by a railroad company except some differences as to the measure of damages, are equally applicable to the condemnation of land for a public road. Both counties and railroad companies are controlled by the same provisions of the constitution and substantially the same statutory regulations in the matter of being held to strict accountability for property taken, injured or destroyed by them.

All provisions of the Constitution on that subject are mandatory, and no statute will be upheld which can be so constructed as to impair their salutary meaning or effect. The obvious meaning of sections 13 and 242, Constitution, is not only that persons whose property is taken for public use (and it can be taken for no other) shall receive just compensation therefor, but that this compensation must be received by them or tendered them before the property is taken. This rule, as declared in the several cases we have cited, can no more be disregarded by the judgment of a court than by the act of a corporation or an individual.

According to the averments of the petition, appellant, though deprived by the judgment of the county court of a sufficiency of his land for a roadway, has not been paid its value or any part of the incidental damages thereby caused him.

This should have been done before depriving him of the possession of the land. While the judgment appears to have fixed the amount to which he was regarded by the court entitled, it failed to require its payment before depriving him of the land, and the appropriation of his land to the use of the public as roadway under the circumstances was a clear violation of the sections of the Constitution, *supra*, constituting a trespass for which the county of Fulton is liable in damages. Appellant might have taken an appeal from the judgment, or he might have obtained an injunction to prevent the opening of the road, but he was not bound to pursue either of these remedies. He also had the right to elect to sue for the trespass as he has done, and the judgment of the county court will not bar the action, if the averments of the petition are established by proof. He is not required to allege a failure of the county to tender payment of the damages due him. If there was such a tender made, that is a matter of defense which the county must set up by answer.

It is sufficient to allege, as he has done, that he was not paid the damages before the land was taken or at all.

For the reasons indicated the judgment of the circuit court is reversed and cause remanded with directions to overrule the demurrer to the petition and for further proceedings consistent with the opinion.

Whole court sitting.

Berry v. Berry, et. al.

(Decided March 4, 1919.)

Appeal from Daviess Circuit Court.

1. **Compromise and Settlement—Fraud.**—In an action on a compromise agreement, evidence examined and held insufficient to show that the agreement was obtained by fraud.
2. **Compromise and Settlement—Fraudulent Concealment of Facts—Mistake of Law and Fact—Evidence.**—Where a son's claim against his mother's estate, for services rendered in managing her farm, was compromised by the heirs, the failure of the son to disclose a settlement agreement between him and his mother was not a fraudulent concealment of facts, which would of itself avoid the compromise or furnish a basis for the contention that the compromise was made under a mistake of law or fact, where the settlement showed on its face that it related to other matters and

did not include the son's claim for services, and was therefore immaterial.

3. **Compromise and Settlement—Requisites.**—Where there is a question between the parties about which reasonable men may differ as to the outcome, the parties may adjust the difference between themselves by way of compromise, which will be upheld though it subsequently develops that one of the parties was right and the other wrong.
4. **Compromise and Settlement—Requisites—Evidence.**—In an action to enforce a compromise of a son's claim against his mother's estate, for services rendered in managing her farm, executed by the son and the other heirs, held, that the fact that the services were performed, coupled with the fact that the mother proposed a settlement and carried the settlement into effect by devising to him a greater portion of the estate than he would otherwise have received, was sufficient to show that his claim was one about which reasonable men might differ, and to support the compromise.

W. P. SANDIDGE and R. W. SLACK for appellant.

BEN D. RINGO and LaVEGA CLEMENTS for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

Sallie A. Berry lived on a farm just west of the city of Owensboro. Her husband died in the year 1877, and left surviving him seven children, John H. Berry, Henry S. Berry, Edward C. Berry, George B. Berry, Lide Berry, Rowena Berry and Nannie Berry.

Lide died before reaching her majority.

John H. Berry worked on the farm for a while and then moved out west. The other children, with the exception of Henry, lived on the farm for some time and then settled in the neighborhood. Henry became twenty-one in the year 1884, and managed the farm for his mother until June, 1901. During that time he managed the farm very profitably and helped to bring up and educate the other children. The proceeds from the farm were deposited to the credit of his mother, and he received nothing for his services except his board and clothes. In the year 1901 his mother approached him and asked him what he wanted for his services. He said to her, "Mother, you think more of Ed than any of the children. You and Ed agree upon my services and I will accept it." On the same day, his mother and Ed consulted about the matter and stated to him that his mother had made a will giving him his sister Lide's share of the estate as compensa-

tion for his seventeen years of work. On the same day, his mother made a will carrying out this agreement. During the same year, Henry made a contract with his mother by which he was to occupy the farm with her and pay her \$1,000.00 a year and her support. This arrangement was continued until his mother's death. Shortly before her death he made a settlement with her covering the period from January 1, 1902, until January 1, 1913. During this time, Henry paid out for his mother, for own use and as advancements from her to some of the children, more than \$16,000.00. Charging himself with the rent during this period and the personal property on the farm when he took charge, there was left due him the sum of \$3,063.98. His claim for this amount was subsequently filed in this action and allowed. His mother died in the year 1914. Shortly before her death, she revoked the will made in the year 1901, giving to Henry his sister Lide's part of the estate, and made a new will leaving out this provision and devising the property to all her children. By this last will, which was duly probated, Edward C. Berry and Henry S. Berry were appointed executors and duly qualified. Shortly thereafter, Henry S. Berry tendered his resignation, which was duly accepted by the Daviess county court.

This suit was brought by Edward C. Berry, as executor, and in his own right, and Nannie Berry and George B. Berry against John H. Berry, Henry S. Berry and the other children for a settlement of the estate. After the will was probated, Henry S. Berry made out a claim against his mother's estate for \$10,000.00 for services rendered by him in the management of the farm from 1884 until 1901. The first discussion of this claim took place in the presence of all the children, and John and the others insisted that they would stand by the will. After that, overtures for compromise were made and after considerable discussion a written agreement was executed, by which John H. Berry agreed to pay the sum of \$700.00, Nannie Berry the sum of \$1,300.00, George B. Berry the sum of \$1,333.33 and Edward C. Berry the sum of \$1,333.33, in settlement of Henry's claim against his mother's estate. It was further agreed that these sums should be paid by the executor out of the estate. In his answer to the settlement suit Henry S. Berry pleaded the foregoing agreement, and asked judgment against his brothers and sisters for the foregoing amounts, and that

the executor be required to pay the amounts out of the estate. Nannie Berry and Edward Berry made no defense, but John H. Berry and George B. Berry filed replies, pleading in substance that the compromise agreement was obtained by fraud; that it was executed under a mistake of law and fact and was without consideration. Several depositions were taken and on final hearing the chancellor rendered judgment in favor of John and George on the sole ground that Henry had no legal claim against his mother's estate. Henry appeals.

The contention that the compromise agreement was obtained by fraud is based on the claim that Edward Berry and Nannie Berry represented Henry Berry, and Nannie Berry stated to appellees that she had consulted lawyers out west, who had told her that Henry's claim was valid, and that they were influenced by her representations, as well as the representations of Edward Berry, to make the compromise. There is absolutely no ground for the conclusion that either Ed Berry or Nannie Berry represented Henry Berry. As a matter of fact, their interests were antagonistic to those of Henry. All that the testimony shows is that after a full discussion of the matter, they recognized the justice of Henry's claim and preferred to compromise it rather than to subject themselves and their brothers and sisters to the annoyance and notoriety of a family suit, and therefore recommended the compromise.

The mistake of law and fact, on which the appellees relied, is that the claim of Henry for the services in question was concluded by the settlement made with his mother on March 6, 1913, and this settlement was fraudulently concealed from them, and that if they had known of it they would not have signed the compromise agreement. It is true that the settlement contains the following language: "This is a final settlement between Henry Berry and Sallie A. Berry," but it shows upon its face that it relates solely to matters growing out of the operation of the farm after Henry took charge thereof, and agreed to pay his mother \$1,000.00 a year, and was not intended as a settlement of Henry's claim for services rendered while he managed the farm for his mother. That being true, it was immaterial whether appellees had knowledge of this settlement. Under the circumstances, Henry was not bound to disclose it, and his failure to do so was not a fraudulent concealment of facts, which

would of itself avoid the compromise or furnish a basis for the contention that the compromise was made under a mistake of law or fact.

The chancellor seems to have proceeded upon the theory that if, as a matter of fact, Henry's claim against his mother's estate was not well founded in law, it could not be the subject of a valid compromise. He then proceeded to consider the claim on its merits, and being of the opinion that it was not well founded, he held John and George not bound by the compromise agreement. In reaching this conclusion, he held that the relationship of the parties was sufficient to raise the presumption that they lived together as a matter of mutual convenience, and that under these circumstances the law did not imply a promise to pay for the services rendered by Henry, but that it was necessary to show an express contract which the evidence failed to do. It is not necessary to sustain the compromise of a doubtful right, that the parties shall have settled the controversy as the law would have done. It is immaterial upon which side the right ultimately proves to be, and the compromise may be sustained, although it afterwards develops that the right is on the other side. Nor will the courts inquire as to which party had the better right, for, as held by many decisions, to require a party to establish his original right would in effect destroy all compromises and render such contracts useless. 12 C. J. 327; *Mill's Heirs v. Lee*, 6 T. B. Monroe 91, 17 Am. Dec. 118. Hence, the rule is, that if there be a question between parties, about which reasonable men might well differ as to the outcome, the parties themselves may adjust it by way of compromise, and the agreement will be upheld by the courts. *Western & Southern Life Insurance Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456. Without entering into a review of all the evidence, we think the fact that the services were performed, coupled with the fact that the mother proposed a settlement and carried the settlement into effect by devising to him a greater portion of the estate than he would otherwise have received, was sufficient to make his claim one about which reasonable men might differ. That being true, and it further appearing that the agreement was free from fraud or deception, and was entered into in good faith, it follows that the agreement should be upheld.

Judgment reversed and cause remanded with directions to enter judgment in accordance with this opinion.

Hoffman v. Arnold, et al.

(Decided March 4, 1919.)

Appeal from Bullitt Circuit Court.

1. Pleading—Exhibits.—Where the allegations of a pleading are in conflict with an exhibit attached to it, and upon which the pleading is founded, the exhibit controls.
2. Pleading—Demurrer.—A petition which shows the plaintiff's right of recovery depends upon the non-performance or failure of a named contingency, must negative the contingency and show the absolute right of the plaintiff, else the pleading is demurrable.
3. Wills—Construction.—A will which bequeaths the whole of the estate, not otherwise disposed of, to C, in case the mother of a named child will not surrender the child into the custody of another person, disposes of the whole estate of the testator, and a house and lot owned by him passes under the will, and is not undevised.

HENRY J. TILFORD for appellant.

CHARLES C. CARROLL for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

On November 11, 1907, J. A. Hoffman died testate, the owner of considerable real and personal property, of which a certain house and lot, in the city of Shepherdsville, is the sole subject of this litigation. He had been married twice; a son, Roger A. Hoffman, by his first and divorced wife, and Essell Hoffman, a daughter by the second wife, survive, and are parties to this action. The house and lot in dispute were held and occupied by the widow after the death of Hoffman until the 26th day of May, 1908, when she and Kate Connell, a devisee mentioned in the will, by deed conveyed said property to appellee Arnold. The widow having since died, appellant, Essell Hoffman, instituted this action in equity in the Bullitt circuit court against Arnold, joining her brother, Rodger A. Hoffman, as defendant, to recover said house and lot for herself and brother on the grounds that said property was undevised estate of her father, J. W. Hoffman, which his heirs at law, she being one, were and are entitled to take. If it were undivided estate appellant, Essell Hoffman, was and is entitled to a one-half undivided interest therein, and the other moiety passed to appellee, Rodger A. Hoff-

man, on the death of the widow. All this depends upon the construction of the will and codicil of J. A. Hoffman, the material parts of which are as follows:

“Shepherdsville, Ky., May 10, 1896.

“Be it known to whomsoever, that the following is the manner, way and condition I dispose of all my property of whatsoever, money, notes and accounts included, to take effect at and after my death, viz.:

“First. To my two half-brothers and two half-sisters (of which I know but little) and their heirs at law one cent each.

“Second. To my two aunts, M. J. McKee and J. F. Evans and their heirs at law one cent each. To my two uncles, G. W. Anderson and D. L. Anderson, and their heirs at law, one cent each.

“Third. To Roger Hoffman, the son of my divorced wife, Emma D. Hoffman (maiden name Emma D. Anderson) but now or the last time heard from, Emma D. Patterson) one cent. If he has any legal children to each of them one cent.

“Fourth. To my uncle and aunt, John Hoffman and Bettie Hoffman and their brothers and sisters and all the heirs at law each of them—I know not how many there are of the first nor second, not having been among them since a boy—one cent each.

“Fifth. To my wife (illegal I hold her to be and never agreed with her nor any other person to have the suit against her dismissed, nor gave my consent to have it dismissed, but told my attorney, F. P. Straus, not to have it dismissed) Myra Bell Hoffman, one cent, if the courts hold her to be my legal wife and entitled to heir of my estate as such, so mote it be, but such a construction is not to operate against any other part of my will not inconsistent with such construction, if from any cause or by whatever means she heirs a greater portion of my estate, then her child, Essell, the only child born to her since our marriage Jan. 9th, 1895, shall have only one cent of my estate.

“Sixth. Not being satisfied and very greatly doubting that Essell, the daughter of Bell Hoffman, above spoken of, is the fruit of our marriage (be it legal or illegal marriage) I give to her only one cent. However, when she (Essell) arrives at the age of five years, if she has any resemblance of me that would warrant three honorable, respectable trustworthy gentlemen of good

judgment who are not my enemies and at no period of their existence have been and who are friends of Wm. Bryant family or any part of the family, in saying under oath, that beyond any doubt they believe her (Essell) to be a child of my blood, then she is to have my entire estate, but the gift is subject to the condition as expressed in the fifth paragraph of this will. Whatever part of my estate Essell, the daughter of Myra Bell Hoffman, born about Oct. 5, 1895, may heir as given by will or determined for her by the court is to be kept for her by some friends of mine or some trust company and no part of the principal or proceeds or interest is to be expended for any purpose except for the absolute necessity occasioned by sickness unless she is under the absolute control and training and rearing of some other person than her mother or any one kin to her mother. When she is 21 years old whatever part of my estate, together with the interest and proceeds thereof she heirs is hers to do as she pleases to do with but should she die without heirs of her body (child) whatever she has obtained from my estate, not necessarily expended after her burial expenses are paid, I desire and will to give to Kate Connell of Shepherdsville, Ky.

"Seventh. I desire and will and am extremely anxious about it, that when Essell (the child spoken of in this will) arrives at the age of 2 years old that the court appoint some good person of good habits, morals and disposition and not a Catholic and who will not teach her any religion except common sense and morality and honesty and no kin to her mother (they are all too ill-bred people to properly train a child) to take her and do by her as the part of my estate given her will admit of.

"Eighth. If her mother (Essell's mother Bell) will not give her up and there is no way of getting her (Essell) from under her (Bell) control or any of her heirs (Bell's kin) then the whole of my estate not disposed of by court as spoken of, or any other way disposed of by court or myself to brothers and sisters and their heirs at law, uncle and aunts and their heirs at law, Roger Hoffman and his heirs at law, his mother, Emma D. Patterson, I will and bequeath to Kate Connell of Shepherdsville, Ky."

“Shepherdsville, Ky., Aug. 13, 1903.

“(Codicil)

“1. I, J. A. Hoffman, having become fully satisfied in regards to Essell, the daughter of Myra Bell Kendall, alias Hoffman, I will and bequeath to her one cent only of my estate and under no condition whatever is she to have any part of my estate.”

A general demurrer by appellee Arnold was sustained to the petition, and appellant, Essell Hoffman, declining to amend or further plead, the petition was dismissed by the trial court, and she prosecutes this appeal.

In order to determine whether the petition presented a cause of action which entitled appellant, Essell Hoffman, to the relief she sought, or any relief, it is necessary to examine the will and codicil of J. A. Hoffman, which she attached to her petition as an exhibit. Appellant's contention is that her father, J. A. Hoffman, died intestate as to the house and lot described in the petition and that she, as his daughter and one of two heirs, inherits a one-half undivided interest in and to the same, and on the death of the widow, her mother, appellant was entitled to immediate possession, despite the attempted sale and conveyance of the property by the widow and Kate Connell, a devisee, to appellee Arnold; that the widow had only a life estate which ended at her death on the 22nd day of March, 1917, and Kate Connell took no interest whatever in said property under the will, because, as appellant contends, the devises to Kate Connell were all conditioned upon appellant first taking, and since the codicil wholly deprived appellant of an interest in the estate, under the will the devise to Kate Connell being contingent upon appellant first taking, must necessarily fail, thus leaving the house and lot as undevised property of the estate of her father. She bases her claim to the property upon the well established principle that “although the intention to disinherit the heir be ever so apparent, he must, of course, inherit, unless the estate is given to somebody else; and the reason is, that the law provides how a man's estate at his death shall go, unless he, by his will, plainly directs that it shall be disposed of differently.” *Denn v. Gaskin Cowp.* 657; *Todd, etc. v. Gentry*, 109 Ky. 704; *Coffman v. Coffman*, 85 Va. 459, 2 L. R. A. 848.

Appellant does not claim under the will, but acknowledging that by the codicil she is disinherited, seeks only as an heir to recover the property in question as a part of the undevise estate of the testator.

Did the property in question pass under the will to Kate Connell? If it did not, then appellant takes as heir. The codicil of August 13, 1903, copied above, fixes beyond question the interest of appellant in the devised estate of her father. By that instrument she could have but one cent. The right of an heir to undevise property is not questioned by appellees in this controversy. But they insist that Hoffman disposed of his entire estate by his will and codicil. To sustain this contention appellees call attention to the first three lines of the will, which read: "Be it known to whomsoever, that the following is the manner, way and condition I dispose of *all* my property of whatsoever kind, money, notes and accounts included," and insist that this language imports a purpose and intention on the part of the testator to pass all his estate, both real and personal, of every character and kind, by his will and the codicil thereto. By items 1, 2, 3 and 4 of the will, the testator devised to his half-brothers and sisters, uncles and aunts, and to his son Roger A. Hoffman, and their legal heirs, one cent each. By the fifth item he gave to his wife, Mary Bell Hoffman, one cent, with this provision: "If the courts hold her to be my legal wife and entitled to heir of my estate as such, . . . if by any cause or by whatever means she heirs a greater portion of my estate, then her child Essell, the only child born to her since our marriage, Jan. 9, 1895, shall have only one cent of my estate. The sixth and seventh items do not appear to be of controlling influence in the determination of this controversy, and we shall pass them over. Item eight of the will, omitting the parenthetical clause and explanatory statements, is in substance as follows: "If Essell's mother will not give her up, then the whole of my estate, not otherwise disposed of, I will and bequeath to Kate Connell, of Shepherdsville, Ky." When this item is read in connection with the first paragraph of the codicil of August 13, 1903, copied above, which, when brought to its final analysis, is, "I will and bequeath to Essell one cent only of my estate, and under no condition whatever is she to have any part of my estate," the rights of appellant are immutably fixed.

The devise to Kate Connell, under item eight of the will, was not made to depend upon appellant first taking, but on the contrary Kate Connell was to take the entire estate if Essell did not qualify as provided in the will. Kate Connell was devised the residue of the estate after the payment of the few legacies of one cent each, set forth in items 1, 2, 3, 4 and 5 of the will, on condition that appellant, Essell Hoffman, did not come within the provisions of the will. The testator, however, having become satisfied concerning the parentage of Essell, by a codicil fixed her share at one cent and forever shut her out as a contingent devisee under item eight of the will, thus leaving Kate Connell to take all the rest and residue of the estate.

Whether this is the construction placed upon the will by the trial court or not, the conclusion reached by that tribunal was eminently correct, because the petition, while setting forth the conditions of the will and especially that in items seven and eight, to the effect that "in the event plaintiff's mother, the said Mary Belle Hoffman, should not surrender the custody and control of this plaintiff to some person to be appointed by the court, then the whole of testator's estate, not otherwise disposed of, should pass to and become the property of said Kate Connell," did not negative the exceptions and conditions therein pleaded. As Essell could not take the estate, unless her mother surrendered her to another, her surrender was a condition precedent. The devise was to Kate Connell of the residue of the estate, if Essell did not qualify. The eighth clause of the will does not confer the estate upon Essell, but provides for its distribution in case Essell's mother will not give her up. Having alleged a condition precedent in the petition, it was incumbent upon appellant, as plaintiff below, to show by pleading that Kate Connell did not come within the exception and take the whole estate. Secs. 316b, 553 and 554, 3rd edition, Newman's Pleading and Practice.

The averments in the petition do not show that Kate Connell does not fall within one of the exceptions which would defeat appellant's right to the property. It was incumbent upon appellant to aver facts showing her right as heir, jointly with her brother to the property, absolutely and not a mere possibility which was subject to be defeated by a named contingency which, so far as the pleading shows, happened. On demurrer a

pleading is construed strongest against the pleader, and when the petition in this case is so construed, it does not state a cause of action. The general demurrer, therefore, was properly sustained.

Judgment affirmed.

Cooper, et al. v. Clark, et al.

(Decided March 7, 1919.)

Appeal from Pike Circuit Court.

Appeal and Error—Appealable Orders—Order Setting Aside Judgment.—An order setting aside a judgment in term time, and permitting the defendants to answer, is not a final order from which an appeal will lie.

JAMES M. ROBERSON, ROSCOE VANOVER, E. J. PICKLESEIMER and R. H. COOPER for appellants.

CLINE & STEELE for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Dismissing the appeal.

On July 26, 1917, plaintiffs, R. H. Cooper, and D. H. Hatcher, brought this suit against the defendants, T. N. Clark and the Omar Oil & Gas Company, to recover rentals in the sum of \$1,000.00 on leases which they had assigned to defendants, and damages in the sum of \$18,691.00 for a failure to comply with certain terms of the contract, and also the further sum of \$30,000.00, the cost of drilling wells according to the contract. On August 6th following, Messrs. Cline & Steele appeared as attorneys for the defendants and filed a demurrer to the petition. The next regular term of the Pike circuit court following the filing of the demurrer began on September 10th. On September 15th, the demurrer was overruled. On the same day, plaintiffs filed an amended petition and defendants insisted on the demurrer to the petition as amended. On September 18th, an order was entered overruling the demurrer to the petition as amended. On September 19th, plaintiffs made a motion to have the allegations of the petition and the amended petition taken as true. The defendants objected and were given until September 24th to file an

answer. On September 28th, an order was entered, giving the defendants until October 6th to prepare and file their answer, and providing that if the answer was not filed by that time, the allegations of the petition as amended should be taken as true. No answers were filed on October 6th, and judgment was rendered in favor of plaintiffs for the amounts sued for.

On October 10th, and at the same term, defendants appeared by counsel and filed a motion and grounds for setting aside the judgment, and filed in support thereof the affidavit of counsel. The court, deeming the grounds sufficient, entered an order setting aside the judgment theretofore entered and permitting the defendants to file their answers. From this order plaintiffs appeal.

It will be observed that the appeal is prosecuted from an order setting aside a judgment in term time, and permitting the defendants to answer. It is well settled that such an order is not a final order from which an appeal will lie. *Darby v. French*, 112 S. W. 1132, 3 C. J., sec. 336, 2 R. C. L., sec. 27, p. 44.

Appeal dismissed.

Blakey v. Commonwealth.

(Decided March 7, 1919.)

Appeal from Logan Circuit Court.

1. Perjury—False Swearing—Indictment—Negating False Statement.—An indictment for false swearing must set out the statements alleged to have been made and then aver that the statements were false and were so known to be when made.
2. Perjury—False Swearing—Indictment—Sufficiency of.—It is only necessary that the alleged false statement should be negated in such a way as to certainly inform the accused of the nature of the offense which is charged against him and when the indictment, after setting out the false statements, charges that they were wilfully corrupt and false and were so known to be when made, this is in substance the same as if the alleged false statements were negated in so many words.
3. Perjury—False Swearing—Indictment—Sufficiency of Averment as to Matter Being Investigated.—It is not essential that the indictment should set out the specific matter being investigated by the grand jury at the time the alleged false testimony is given. It is only necessary that it should state facts showing that the matter being investigated related to a subject that the grand jury had jurisdiction to inquire into.

4. **Indictment and Information—Sufficiency of.**—Except in cases where some special technical averment is required an indictment will be good if it gives the accused full and accurate information of the charge against him in language so simple that a person of ordinary intelligence can understand the nature of the accusation.
5. **Perjury—False Swearing—Evidence Sufficient to Convict.**—The falsity of the statement may be shown by the evidence of living witnesses or by documentary or written evidence or by facts that clearly and convincingly establish it.
6. **Perjury—False Swearing—Evidence Sufficient to Convict.**—Where a person was indicted for falsely testifying that he had bought whiskey at a certain time and place from a named person and it was conclusively shown that the person from whom he said he bought the whiskey was at the time confined in a penitentiary, this evidence was sufficient to sustain a conviction for false swearing.

OSCAR M. SMITH and S. R. CREWDSON for appellant.

CHARLES H. MORRIS, Attorney General, and OVERTON S. HOGAN, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—Affirming.

At the May term, 1918, of the Logan circuit court the grand jury returned an indictment charging Blakey with the crime of false swearing, committed as follows:

“The said Blakey heretofore, within one year before the finding of this indictment, to-wit, on the_____ A. D. 19____, in the county aforesaid, did unlawfully, willfully, feloniously and knowingly swear, depose and give in evidence that which was untrue and false before the grand jury of Logan county, in an investigation judicially pending and before and being tried before said grand jury, which it had legal jurisdiction to try and authority to administer an oath, when the said Blakey was called as a witness, after being duly sworn by the foreman of the said grand jury, he did, falsely, willfully, knowingly and corruptly swear, depose and give in evidence that he had bought whiskey from Marvin Patey within the last past twelve months, in Logan county, Kentucky, wherein the local option law was in full force and effect. That when the said Blakey made said statements he knew that each and all of said statements were willful, corrupt and false. In fact and in truth the said Marvin Patey has been since about December, nineteen

hundred and fifteen, confined in the jail of Logan county, Kentucky, and from there sentenced to the penitentiary at Eddyville, Kentucky, and there departed this life; and that from his commitment to the aforesaid jail he was never released, but confined until a few hours before his death; and all of said facts were known to the said Blakey. All of which was so done as aforesaid and against the peace and dignity of the Commonwealth of Kentucky."

On a trial under this indictment in February, 1919, Blakey was found guilty and his punishment fixed at confinement for one year in the state penitentiary.

On this appeal the grounds relied on for reversal are (1) that the indictment was defective and the general demurrer should have been sustained, (2) that the evidence was sufficient to sustain the verdict of conviction, and (3) that the instructions did not correctly submit the law of the case.

The objections urged to the indictment are, first, that it does not sufficiently negative the matter alleged to have been falsely stated in the testimony of Blakey before the grand jury, and second, that it does not charge the specific matter that the grand jury was investigating at the time the alleged false statement was made.

In support of the first objection the argument is that the indictment should have charged in so many words that Blakey had not in truth and in fact bought any whiskey from Marvin Patey and knew that the statement he made under oath that he had bought whiskey from Patey was willfully corrupt and false, instead of averring as it did that "when the said Blakey made said statements he knew that each and all of them were corrupt and false."

It is of course true that an indictment for false swearing must set out the statements alleged to have been made and then aver that the statements were false and were so known to be when made, but we do not regard it as indispensably necessary to the sufficiency of an indictment that in addition to this the indictment should set out that the accused had not done the thing he said he did do, describing it. This would be a mere repetition that in our opinion would add nothing to the definiteness or the clearness of the indictment. It is only necessary that the alleged false statement should be negatived in

such a way as to certainly inform the accused of the nature of the offense charged against him.

In *Fisher, etc. v. Commonwealth*, 152 Ky. 411, the indictment charged that they "did unlawfully, willfully and feloniously and falsely swear, and give in evidence after having been duly and legally sworn, 'certain statements wherein they denied that upon a certain occasion they had shot or discharged a deadly weapon upon a public highway;' and thereafter the indictment further alleges 'that the said evidence was false and untrue and known to the defendants to be false and untrue at the time they so gave it.'" And the court in commenting on the sufficiency of this indictment said: "There is and can be no pretense that appellants did not know what was intended to be charged against them by the allegations of this indictment. The parties to the indictment were specifically named, the offense with which they were charged stated, the venue was charged, and the particular circumstances under which the alleged false evidence was given set out, and these things under the provisions of our Criminal Code were sufficient."

It will be observed that the indictment in this case does charge "that when the said Blakey made said statements he knew that each and all of said statements were willfully corrupt and false," and we think that this was in substance the same as if the direct charge had been made that Blakey had not in fact bought any whiskey from Patey. If the statement that he had bought whiskey from Patey was willfully corrupt and false it would necessarily follow that he had not bought any whiskey from him, and so we think the objection to the indictment for the reason indicated is not well taken.

The other objection is that the indictment should have set forth the specific subject matter being investigated by the grand jury at the time Blakey was inquired of. The charge is that Blakey "in an investigation judicially pending and before said grand jury which it had legal jurisdiction to try did falsely give evidence" in the manner and form pointed out in the indictment, and in our opinion this was a sufficient averment.

Section 1174 of the Kentucky Statutes, under which the indictment was found, reads in part as follows:

"If any person, in any matter . . . which is being investigated by a grand jury . . . shall willfully

and knowingly swear, depose or give in evidence that which is false,”

And under this section we do not think it essential that the indictment should set out the specific matter being investigated by the grand jury at the time the alleged false testimony is given. It is only necessary that it should state facts showing that the matter being investigated by the grand jury related to a subject that the grand jury had jurisdiction to investigate, and this the indictment does.

The grand jury has jurisdiction to inquire into all violations of the liquor laws of the state, and the indictment shows that when Blakey made the false statement the grand jury was inquiring into violations of the liquor laws.

But aside from all this it cannot be doubted that this indictment gave Blakey full and accurate information of the charge against him in language so simple that a person of ordinary intelligence could not fail to understand the nature of the accusation he was called on to meet, and except in cases where some special technical averment is required by statute this is all that is needed to make an indictment good. Upon this point what was said in *Overstreet v. Commonwealth*, 147 Ky. 471, may be repeated here: “The strict and technical rules of criminal pleading that prevailed at common law and for many years in this state have been superseded by the more just and sensible practice that declines to be controlled by unimportant and unsubstantial forms that serve to delay and obstruct the administration of the criminal law without protectin the accused in any right guaranteed to him by either the common law, or the Constitution or statutes of the state.

“ . . . the essential things are that the indictment shall contain (a) the name of the party charged, (b) the offense charged, (c) the county in which it was committed, (d) and a statement of the acts constituting the offense, in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended, and such degree of certainty as to enable the court to pronounce judgment on conviction according to the rights of the case. It is apparent that when an indictment furnishes this information, the accused cannot be misled or deceived by it or fail to know what offense he is charged with, nor will

the court be in doubt when it comes to pronounce judgment. An indictment may contain more than is necessary, or it may be phrased in inapt words, or the sentences may be ungrammatically or awkwardly expressed, or the spelling not conform to approved standards, but if, when considered as a whole, the charge is stated with sufficient clearness and certainty to enable a person of common understanding to know what he is charged with, and to enable the court to pronounce judgment, no error in form of expression will make the indictment bad. Nor will any difference between the accusative part of the indictment and the body or descriptive part of it, that is not so substantial as to be misleading, be fatal to the sufficiency of the pleading. In other words, in considering the sufficiency of an indictment, it will be read and considered as a whole, and if when so read and considered it substantially conforms to the requirements of the Code in respect to the matters therein pointed out as material and necessary, it will be a good indictment. We do not mean to say that an indictment that departs from the substantial rules of Code pleading or that fails in some material respect to conform to common law or statutory requirements should be treated as a good pleading. What we do mean to say is that it is only the substantial material things that are necessary, and that the failure to observe formal or immaterial things will not be regarded as fatal to the indictment."

We are therefore of the opinion that the court did not err in overruling the demurrer to the indictment.

It is further complained that the evidence, to which we may here observe there was no objection or exception, was not sufficient to sustain the finding of the jury, but we are unable to agree with counsel in this contention. It appears from the record that J. R. Rose, who was foreman of the grand jury, after first administering the usual oath to Blakey, asked him if he had bought any whiskey from any person within the past twelve months, and Blakey replied that he had purchased a pint of whiskey from a negro by the name of Marvin Patey, in Russellville, Logan county, Kentucky, about March, 1918. Two other members of the grand jury gave in substance and effect the same evidence. It is further shown by other undisputed evidence that Patey, in 1916, was convicted of the crime of car breaking and sentenced to the penitentiary at Eddyville, in Lyon county, for a term of from

two to five years, and that pursuant to the judgment then entered was taken to the penitentiary at Eddyville, where he remained in confinement until April, 1918, when he died on his way home from the penitentiary.

Blakey, in his own behalf, testified that about March, 1918, he purchased a pint of whiskey from a negro by the name of Marvin Patey. He also testified that after giving this evidence before the grand jury he told George Davis that he had been before the grand jury and had indicted a dead negro.

It appears from this brief summary of the evidence that there is no direct testimony by living witnesses that Blakey did not buy whiskey from Patey, as he testified he did before the grand jury, and if it were necessary that the falsity of the evidence given by a person indicted for false swearing should be made to appear by direct evidence from the mouth of living witnesses the argument of counsel would be sound. But the falsity of the testimony of a witness may be shown by circumstantial as well as by direct evidence, and when it is made clear as it is in this case by undisputed facts that the evidence was false the case against the accused will be as successfully made out as if it had been shown by word of mouth that the evidence was not true.

It was a physical impossibility for Blakey to have bought whiskey in Russellville in March, 1918, from Marvin Patey when at that time, and for some months before, Patey was and had been confined in the penitentiary at Eddyville, in Lyon county, and this fact conclusively established that Blakey's statement was false. Indeed the establishment of the whereabouts of Patey furnished more convincing evidence that Blakey did not buy any whiskey from him than could have been furnished by witnesses who might have said from their personal knowledge that Blakey did not at the time mentioned buy any whiskey from Patey.

The falsity of the evidence of a person charged with false swearing may be shown by the evidence of living witnesses or it may be shown by documentary or written evidence or it may be shown by facts that clearly and convincingly establish the falsity of the statements made by the accused. Commonwealth v. Davis, 92 Ky. 460.

The remaining ground for reversal relates to the instructions. The court in the instructions told the jury that if they believed to the exclusion of a reasonable

doubt that Blakey willfully, feloniously and knowingly, while a witness before the grand jury and after he had been duly sworn, made the false statement that he had bought whiskey from Marvin Patey in Logan county within twelve months before that day, and if they should further believe that at the time said statement was made it was false and untrue and was known to be false and untrue by Blakey and was made for the corrupt purpose of deceiving the grand jury they should find him guilty. In another instruction they were told they could not find him guilty unless it had been proven to the exclusion of a reasonable doubt by the testimony of two witnesses, or one witness and strong corroborating circumstances, that he had given false testimony. In another they were instructed that if they had a reasonable doubt of his guilt they should find him not guilty. It seems to us that these instructions aptly presented to the jury the whole law of the case.

Finding no error in the record prejudicial to the substantial rights of the accused, the judgment is affirmed.

Bugg & Franks v. Jones.

(Decided March 7, 1919.)

Appeal from Ballard Circuit Court.

1. **Damages—Measure of Damages for Breach of Contract.**—For a breach of a contract where there is no bad faith or fraud in evidence the measure of damages as a general rule is compensation for the loss which naturally results from the breach, limited, however, to such losses as the parties might have reasonably contemplated as a probable consequence and which are capable of being estimated with reasonable accuracy.
2. **Damages—Loss of Time in Furnishing Road Implement—Compensation.**—For delay in failing to furnish a roller according to contract with which to construct a road, the damages should be limited to compensation for loss of time, the differences in cost of construction and necessary repairs occasioned by the delay if sufficiently proven to permit of reasonably accurate estimation.
3. **Damages—Evidence of Profits.**—Evidence of profits should be excluded under such circumstances, since compensation for losses resulting from the delay covered the whole loss.
4. **Damages—Excessive Damages.**—A verdict for \$500.00 held excessive where the evidence did not show damage with sufficient

accuracy to permit of reasonable estimation beyond \$150.00 for loss of time.

JOHN E. KANE for appellants.

J. B. WICKLIFFE for appellee.

(OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

The appellants, Bugg & Franks, had a contract with Ballard county to construct about ten miles of macadamized road; they sublet to appellee the construction of slightly over two miles of the road by written contract, by which they agreed to furnish him a roller and grader for use in performing his contract. Alleging a failure to furnish the roller as agreed, appellee brought this action to recover \$1,000.00 as damages for the alleged breach of contract, and upon a trial, the jury returned a verdict in his favor for \$500.00; and to reverse the judgment entered thereon the defendants have prosecuted this appeal.

The principal grounds of complaint are that the court erred in defining the measure of damages in the instructions to the jury, the admission of incompetent evidence, and that the verdict is excessive..

The measure of damages fixed by the court was the difference between the amount it would have cost plaintiff to have constructed so much of the road he had contracted to build before the filing of the suit, if the road roller had been furnished to him by the defendants as agreed, and the cost of constructing the road, after their refusal to furnish him with the road roller, if they did refuse, not exceeding the sum of \$1,000.00.

Plaintiff's evidence was that he had the grade of the road ready for the roller on the 6th or 7th of November, and demanded of the defendants that they furnish him the roller, with which to complete the grade as required by the specifications and contracts with the county and between the parties, but that they did not furnish it until November 17th; that upon one or two occasions thereafter, and before December 5th, he was delayed by the failure of the defendants to furnish the roller promptly upon demand; that altogether between the 7th of November and 5th of December, he was delayed from ten to fifteen days by the failure of the defendants to furnish the roller when required and demanded of them.

He also testified that if the roller had been furnished according to contract, he could have completed his work by January 1st, but no one testified as to what portion of it he could have completed by December 5th, the date he filed his suit, and about which time the evidence shows without contradiction, the weather became unfit for road work, and all work was suspended until the next June, by order of the fiscal court, as it had a right to do under the contract. It was also shown for plaintiff that the winter rains washed the unrolled grade and damaged it more than would have been the case had it been rolled and macadamized; but it is not shown what portion of the road could have been rolled and macadamized before the bad weather set in and work was suspended, if the roller had been furnished, nor what the damage was to this particular part of the road, or the cost of repairing same. He further proved that he could have employed the necessary teams at \$3.00 a day, and laborers at \$1.50 a day, during November and December, but that in the following June, teams would have cost him \$4.00 a day and laborers \$2.00 a day, but there is no showing of the number of teams or laborers required or what it would have cost at either time, to have constructed so much road as plaintiff could have constructed, if the road roller had been furnished before the bad weather began and all work was suspended by order of the fiscal court. Plaintiff was permitted to testify over the objections and exceptions of the defendants, that he "figured" he could have made a profit of \$61.00 a day out of the work during the ten or fifteen days that he was prevented from working by the defendants' failure to furnish the roller; but, upon cross-examination admitted that although he was to receive a fixed price for his work, he had never calculated what it cost him to construct so much of the road as had been completed, and that he did not know what it would cost him to complete it. So that his testimony that he "figured" that he would make about \$61.00 a day profit, had very little or no probative value, and besides evidence of profits was incompetent and should have been excluded because plaintiff was not deprived of his contract by the alleged breach, but was only delayed in its completion and if allowed the difference in the cost of construction and necessary expenses resulting from the failure of defendants to furnish the roller according to contract, he would get all the profits out of the contract he could have made if there had been no breach by the defendants.

Plaintiff also testified that his expenses during the delays occasioned by defendants' failure to furnish the roller amounted to about \$10.00 a day, although he was unable to state any amount he had paid to any person because thereof. It will therefore be seen that upon this testimony, excluding the evidence of profits, that even if the jury allowed him \$10.00 a day as expenses incurred by him by reason of the delay for 15 days, rather than for 10 or 15 days, as he fixed the number of days he was prevented from working, by the failure to furnish the roller, and if they allowed him \$200.00 as the cost of repairing injuries done to the completed grade by the winter rains, although all of that amount was not shown to have been the cost of repairing the damages to so much of the grade as he could have completed except for the failure of the defendants to furnish the roller before the bad weather set in, they ought not to have awarded him more than \$350.00, unless they added something for the difference in cost of labor and teams, which must have been a guess pure and simple, since although there is evidence that the cost of teams and labor was higher in the summer of 1917, when the work was completed, than in November, 1916, when plaintiff claims a part of it could have been completed, there is no evidence whatever as to what portion of the road this should be applied, or as to the number of teams or laborers that would have been required, so that it is manifest the verdict is grossly excessive and for that reason the judgment must be reversed.

2. It is also apparent from this evidence, only loss of time fixed by plaintiff at \$10.00 per day for 10 or 15 days, was proven with sufficient accuracy to permit of estimation. As to what part of the road plaintiff could have completed before December 5th, without a breach of the contract or what it would have then cost, or how many laborers or teams would have been required to do the same work later, and what it would have cost, the jury were left to guess, so upon the evidence the court should not have fixed the criterion at the differences in costs before and after the breach, but should have restricted the recovery to loss of time, the only item sufficiently proven, because it is the rule that for breach of a contract where there is no bad faith or fraud in evidence, the measure of damages is compensation for the loss which naturally results or follows the breach, limited,

however, to such losses as the parties might have reasonably contemplated as a probable consequence and which are capable of being estimated with the reasonable accuracy. (13 Cyc. 156.)

Within this rule evidence of expenses necessarily incurred by plaintiff, if any, while waiting for the roller, of the difference between what it would have then cost him to construct so much of the road as he could have completed by December 5th, if there had been no breach and what it would have cost him to do the same work the next June, as well as of the cost of repairing any damage to the same incompleated portion of the road as resulted from the delay occasioned by the breach, was competent and properly admitted, as these several items of possible damage it seems to us must have been reasonably contemplated as a probable consequence of such a breach of the contract as is alleged, and which are capable of being reasonably ascertained, but the instruction upon the measure of damages should have been restricted to such of these several items as were supported by sufficient evidence to permit of a reasonably accurate estimation by the jury.

Wherefore the judgment is reversed and the cause remanded for another trial consistent with this opinion.

Louisville & I. R. Co. v. Schuester.

(Decided March 7, 1919.)

Appeal from Jefferson Circuit Court (Common Pleas, Second Division).

1. Negligence—Contributory Negligence—Motor Vehicles.—Operator of a motor truck not guilty of contributory negligence as a matter of law simply because as he approached a dangerous grade crossing after looking and listening he fixed his gaze upon the crossing, which was rough and in bad condition, in order to drive his truck across the railroad tracks or because he did not stop and look and listen.
2. Negligence—Care to be Exercised at Dangerous Crossings—Instructions.—While both the plaintiff and defendant at a dangerous crossing must exercise the same degree of care commensurate with the danger the defendant can not complain of the failure of the instructions to place upon the plaintiff this degree of care where the court gave substantially the same instruction as plaintiff offered upon the question.

3. **Damages—Negligent Destruction of Property.**—Where personal property which is actually in use at the time and can be replaced is destroyed negligently, the owner may recover its value at the time and in addition as special damages the value of its use until it could be replaced or interest from the date of destruction, but he can not recover both interest and the value of its use.

ALFRED SELIGMAN, STRAUS, LEE & KREIGER and HOWARD B. LEE for appellant.

NATHAN KAHN for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

Guetig's lane, a public road, crosses appellant's track a short distance east of the corporate limits of the city of Louisville, and near the crossing, at which appellant maintains an automatic electric alarm bell, there is a building on the western edge of the highway, which is 27 feet from the railroad track, with a porch that extends to within about 16 feet of the track.

At about ten a. m. June 21, 1916, appellee, driving his automobile truck, loaded with milk and passengers, north on Guetig's lane, attempted to cross appellant's track at the crossing, when an east bound work train struck the truck. Alleging the collision was caused by the gross negligence of appellant's agents in charge of its work train, appellee instituted this action and recovered a verdict and judgment for \$1,500.00, for the destruction of his truck, \$200.00 for loss of its use, and \$145.00 for the loss of cans and milk.

To reverse that judgment the defendant relies upon three grounds: (1) the verdict is flagrantly against the evidence; (2) the instructions put upon defendant a higher duty at the crossing than upon plaintiff, and (3) the measure of damages was erroneously defined.

1. As plaintiff approached the crossing his view of the railroad track in the direction the work train was coming, as well as the view of the train crew of the road on the side from which plaintiff was approaching, was for a time completely obstructed by the building above described, and somewhat interfered with, if not completely obstructed, by some large trees near the railroad track about 70 or more feet west of the crossing. Appellant testified that as he neared the crossing he reduced the speed of his truck to four or five miles an hour, looked up and down the track 25 or 30 feet, as he passed from

behind the store building and listened for signals of an approaching train; that he could have seen down the track 70 or 80 feet to where it was almost covered by four large trees in full foliage; that he saw no train; that no signals of any kind were given from the train and that the stationary automatic bell was not ringing; that he then fixed his attention upon the railroad crossing, which was rough and in bad condition, in order to drive his truck across the track with as little jar to his milk and passengers as possible; that he could have stopped his truck within a foot or almost immediately; that just as he got on the track some one said "jump," and looking up he saw the train was within 25 or 30 feet of him; that its whistle and bell sounded just before it hit his truck. Quite a number of witnesses were introduced by both parties as to whether the train gave signals of warning as it approached the crossing, and whether the stationary bell was ringing, with the usual result, some witnesses testifying one way and about the same number the other, so there can be no doubt the issue as to defendant's negligence was for the jury, as was also we think the question of plaintiff's contributory negligence, since we would be unwilling to say as a matter of law plaintiff was negligent in fixing his gaze upon the crossing after looking up and down the track, as he testified he did, even though possibly he might have been able to have seen the train's approach in time to have stopped his truck before reaching the crossing, had he kept his eyes constantly on the tracks, since prudence demanded of him that he should give a part of his attention at least to the road and crossing over which he had to drive his truck, especially since the crossing was rough and in bad condition; and he was under no absolute duty to stop. *L. & N. R. R. Co. v. Treanor*, 179 Ky. 337.

There was in our judgment ample evidence to support the verdict upon the questions of negligence and contributory negligence, and we find no merit in the first contention.

2. Instruction No. 1, defining defendant's duty with respect to the crossing, clearly proven to be an unusually dangerous one, required of it care commensurate with the danger, and of this there is no complaint, but it is insisted the court erred in instruction No. 2 in not placing upon plaintiff the same duty of exercising increased care commensurate with the increased danger; and this is true,

since we have uniformly held that the rights and duties of the company and highway travelers with reference to an unusually dangerous grade crossing are reciprocal, and that in its use each must exercise the same degree of care commensurate with the danger. *L. & N. R. Co. v. Locker's Admr.*, 182 Ky. 578; *L. & N. R. Co. v. Breeden's Admr.*, 111 Ky. 739; *C. N. O. & T. P. Ry. Co. v. Champ.*, 31 R. 1057; *L. & N. R. Co. v. Park's Admr.*, 154 Ky. 269.

But in this case the defendant is not in a position to avail itself of this error, because instruction No. 2 of which it complains, is almost an exact copy of, and in substance identical with the only instruction it asked the court to give upon the subject. *Gorman's Admr. v. Louisville Ry. Co.*, 72 S. W. 761; *L. & N. R. Co. v. Wilson*, 148 Ky. 251, 146 S. W. 422; *McClintic Marshall Con. Co. v. Eckman*, 153 Ky. 707, 156 S. W. 382.

3. Instruction No. 4 defined the measure of damages thus:

"No. 4. If you find for the plaintiff, you will award to the plaintiff such sum in damages as you believe from the evidence will reasonably and fairly represent the difference in the reasonable market value of the motor truck just before it was injured and its reasonable market value immediately after it was injured, and if you believe from the evidence that the motor truck could be repaired at a less cost than its reasonable market value before it was injured, then you will also award to the plaintiff the reasonable net rental value upon the market in Louisville of the truck in question or other trucks of like capacity and equal performance, the lessee furnishing the driver and bearing all such other expenses as the owner himself would have to bear in the operation of his truck for such length of time as would be reasonably necessary to make such repairs, not to exceed a period of three weeks at \$25.00 a day, and not to exceed \$525.00. If you believe from the evidence that the motor truck could not be repaired, then in addition to the difference between the market value of the truck just before it was injured, not exceeding \$2,675.00 and the market value of the truck immediately after it was injured, not less than \$350.00, you will award to the plaintiff the rental value of a truck as in this instruction defined for such time as you believe from the evidence would necessarily elapse until a truck of like capacity to the truck in question could be purchased and delivered for use in Louisville, not to

exceed on that account thirty-two days at \$25.00 a day, and not exceeding \$800.00, your verdict in no event, for injury to the motor truck, shall exceed what you believe from the evidence was the reasonable market value of the truck immediately before it was injured, not to exceed \$2,675.00. If you find for plaintiff you will further award to the plaintiff the reasonable value of the milk and milk cans destroyed not to exceed on that account \$164.40."

It will be noticed the court submitted the question of whether there was a reparable injury to or a complete destruction of the truck, which was proper under the evidence, and the only objection is that it was error to allow anything in excess of the difference between its market value just before and just after the collision, if the jury believed the truck was destroyed and not reparable.

In support of this contention, we are referred to *Southern Ry. Co. v. Ky. Grocery Co.*, 166 Ky. 97, in which in discussing the criterion of damages for a reparable injury, which was all that was before the court, it was assumed and stated to be the law that "there can be no recovery beyond the reasonable market value of the property at the time and place of the injury when the same is totally destroyed," and again, "The measure, when personal property is destroyed, is its fair market value at the time and place of the injury."

It was formerly quite generally supposed that the value of personal property at the time and place of its destruction was the full limit of its owner's right of recovery against the tortfeasor, and in this state in *Ormsby v. Johnson*, 1 B. Mon. 80, even interest from the date of destruction was held not recoverable; but in the later case of *Schulte v. L. & N. R. Co.*, 123 Ky. 627, the court, upon a careful consideration of the authorities, overruled the case of *Johnson v. Ormsby*, *supra*, and announced as the better rule and supported by the decided weight of authority, that in addition to the value at the time and place of destruction, if capable of accurate estimation, interest from such time should be allowed in the discretion of the jury.

But plaintiff did not ask interest in his pleadings or offered instructions. He did, however, plead as special damages, the loss of the use of his truck from the date of destruction until a new one could be procured, under

which plea and the evidence in support of it, the court authorized a finding, and the jury awarded him \$200.00 for such loss as we have seen. So the inquiry narrows to the question of whether or not interest is the only allowance permissible in addition to the value of destroyed personal property, in estimating compensatory damages, where its value is capable of accurate estimation at the time of its destruction, as was the case here. To allow interest is unquestionably the simplest and in most cases, no doubt, the most satisfactory method of ascertaining the value of the loss of use, since it avoids any consideration of a peculiar value to the particular owner, which is allowable only under exceptional circumstances. Under circumstances nearly analogous to those here, in *Weick v. Daugherty*, 90 S. W. 966, this court refused to allow to a huckster lost profits resulting from loss of the use of his negligently destroyed wagon, until he could procure another, upon the ground that "the plaintiff can not recover anything on account of his inability to instantly supply himself with other property in lieu of that injured or destroyed. Such damages are too remote to be the subject of judicial ascertainment," citing in support thereof *L. & N. R. Co. v. Tippenhauer*, 10 Ky. L. R. 401, and 8 Am. & Eng. Enc. of Law, 2nd Ed., p. 618.

And in *L. & N. R. Co. v. Schweitzer*, 11 Ky. L. R. 310, and in *Cully v. L. & N. R. Co.* 320, the expenses incurred in an unsuccessful effort to avoid total destruction were rejected, upon the same theory that the value of personal property at the time and place of its destruction was the full measure of damages recoverable.

But in *Schulte v. L. & N. R. Co.*, *supra*, the latest case upon the subject, this court said:

"Where personal property is injured or destroyed by negligent, wrongful or unlawful acts, and the owner is thereby deprived of its use and possession, in a suit to recover damages for the loss, he is entitled to the value of the property and the interest thereon in the discretion of the jury. If the recovery was limited to the value, he would receive no compensation for the deprivation of the use between the time of the injury and the trial, or the date he was restored to the use and possession if this happened before the trial, and the recovery would not be adequate recompense for the loss. This rule cannot be applied when it is sought to recover unliquidated damages, or in cases where no certain or fixed

sum is claimed that may be awarded as compensation, and the jury are authorized to and may assess any amount in their discretion. In this class of cases the amount the plaintiff is entitled to recover cannot be estimated at the time of the injury, or, indeed until there has been a verdict and judgment."

And in the same opinion :

"But where personal property is injured or destroyed, it can be replaced. The person damaged can be made whole. The loss he has sustained is capable of accurate, or at least approximate measurement, and, when he has received the value of the property with interest thereon, he has been compensated for the wrong done, and this is all that, in negligence cases when property only is involved and the elements of fraud, oppression, reckless or intentional wrongdoing are lacking, he is entitled to unless it is sought to recover for the use."

It would seem the court recognized in the above statements and especially, in the last line quoted, that the plaintiff might sue for and recover the value of the loss of use or interest at his option, and this is further clearly indicated later in the opinion where it is stated:

"There are cases in which it would be proper to allow the plaintiff to recover the value of the use of the property of which he was deprived by negligence or wrongful act; but, if a party desires to recover for the value of the loss of the use, it should be especially pleaded. This element of damage cannot be recovered under a general allegation of negligence as in the case before us. And, where damages are sought for the injury done the property, as well as damages for the deprivation of its use, interest is not allowable, as the recovery for the use takes the place of interest. In other words, a party may sue for the injury done personal property, and the jury may in their discretion allow him interest on the sum found, and should be so instructed, or he may sue for damages occasioned by the injury and also for the loss of the use, but he cannot recover interest as well as damages for the loss of the use."

It is therefore apparent that this court in its most recent opinion has so relaxed the ancient rule which limited the recovery for destruction of personal property to its market value at the time and place of the injury, that the recovery may include in addition to the value such consequential damages as proximately result and are sus-

ceptible of accurate estimation, and this relaxation is not only in accord with reason, but with the modern tendency of authority, as well. See 8 R. C. L., sections 62-67; Sedgewick on Damages, sections 436-438; Sutherland on Damages, section 355; Joyce on Damages, section 1034-140.

The theory upon which consequential damages were rejected in the cases from this court, decided prior to the case of *Schulte v. L. & N. R. R. Co.* and cited above, was as we have seen, that they were too remote for judicial ascertainment, and there can be no fault found with the rule in such cases as it is applicable, but the reason for both the rule and its application fails when consequential damages which result proximately and naturally from the wrongful or negligent destruction of personal property, are capable of accurate ascertainment. So the correct rule, if the compensation is to be as nearly adequate as the circumstances will permit as it of course should be, is to allow consequential damages when they can be accurately estimated, but to reject them, as too remote or speculative for judicial ascertainment, whenever they are incapable of accurate estimation. This is the general rule applicable to all damages, long applied in this state and elsewhere for *injury* to personal as well as real property, and for breach of contract, and there is no good reason why it should not also apply to the *destruction* of personal property. For why should the injured party not be permitted to recoup his whole loss, including consequential damages proximately resulting, when his personal property is completely destroyed, as well as when it is injured merely, or if his contract is violated? The only sound reason for ever denying him any part of the loss he may suffer as the result of the wrongful act of another is that it is incapable of accurate estimation and therefore as a necessary rule of practice is too remote or too speculative for judicial cognizance.

Here the plaintiff was operating his truck daily as a common carrier over a scheduled route, and until he could replace it, he had either to rent another or abandon his business, and the rental value of the use of a truck until a new one could be provided was of easy and accurate ascertainment, as was also the value of the truck at the time and place of its destruction; the loss of the use was the proximate and natural result of its destruc-

tion, and having been pleaded as special damages, was a proper element of compensatory damages. As stated in *Sedgwick on Damages*, sec. 436:

" . . . where however, the property was actually in use at the time it was destroyed, the plaintiff may recover compensation for the damage caused by the loss of it up to the time when he could replace it."

Instruction No. 4 having defined the measure of damages in substantial accord with the foregoing principles, was not prejudicial to appellant.

Wherefore the judgment is affirmed.

Yancy's Administrator, De Bonis Non v. Yancy, et al.

(Decided March 7, 1919.)

Appeal from Henderson Circuit Court.

1. **Executors and Administrators—Removal of Administrator—Appointment of Administrator De Bonis Non.—Effect of Striking Out Words "De Bonis Non."**—Where administrators are removed and another appointed in their stead, the latter is an administrator de bonis non, whether the words "de bonis non" are used in the order of appointment or not, and the action of the county court in subsequently striking out these words on the ground of clerical misprision did not affect the relation which the latter sustained to the estate.
2. **Executors and Administrators—Rights and Powers of Administrator De Bonis Non—Recovery from Predecessor.**—Under the common law rule which prevails in this state, an administrator de bonis non can recover from his predecessor or his personal representative only such estate of the decedent as remains in specie, and cannot recover the proceeds of such as had been converted into money, unless such proceeds were kept separate and were susceptible of identification.
3. **Executors and Administrators—Administrator De Bonis Non—Assets Wasted—Right of Action.**—For assets wasted by the first administrator, the right of action is not in the administrator de bonis non, but in the distributees, heirs or creditors.
4. **Executors and Administrators—Action Against Predecessor and Surety by Administrator De Bonis Non—Petition—Sufficiency.**—In order for an administrator de bonis non to recover of his predecessor and the surety on his bond, he must allege that his predecessor had in his hands unadministered assets in kind, or the proceeds of such as had been converted into money and kept

separate and unmixed with those of his own; otherwise, the petition is bad on demurrer.

VANCE & HEILBRONNER for appellant.

YEAMAN & YEAMAN for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

This suit was brought by the Farmers Bank & Trust Company, as administrator *de bonis non* of W. L. Yancy, deceased, against Y. L. Yancy and J. W. Yancy, former administrators of W. L. Yancy, deceased, and their surety, the Fidelity & Deposit Company of Maryland, to require Y. L. Yancy and J. W. Yancy to answer and say what money and other property of the estate of W. L. Yancy came to their hands as such administrators, and to account for and pay over same to plaintiff, and for judgment against all of the defendants for the sum of \$980.37 with interest and costs. The petition was twice amended and the demurrer of the Fidelity & Deposit Company was sustained to the petition as amended and the petition dismissed. Plaintiff appeals.

The original petition alleged the following facts: W. L. Yancy died intestate and a resident of Henderson county, in the month of February, 1915. The defendants, Y. L. Yancy and J. W. Yancy, were duly appointed and qualified as administrators of his estate, and executed bond as required by statute, with the Fidelity & Deposit Company of Maryland as surety. As shown by the inventory and appraisement filed by the defendants as administrators aforesaid, there came into their hands personal property of the value of \$980.37. The defendants, Y. L. Yancy and J. W. Yancy, as administrators, sold and disposed of the entire property which came into their hands and received the proceeds thereof, and refused to account for, or to pay out, the money which came into their hands, to persons entitled thereto, or to make a settlement of their accounts. On September 25, 1917, a rule was issued by the Henderson county court against the defendants, Y. L. Yancy and J. W. Yancy, administrators, to show cause why they should not be compelled to make a settlement of their accounts, and a copy of the order was served on the defendant, Fidelity & Deposit Company of Maryland. The motion for the rule was heard on November 5, 1917, and it appearing

that Y. L. Yancy and J. W. Yancy had failed for more than two years to settle their accounts, it was ordered that they be removed from the office and that the Farmers Bank & Trust Company be appointed administrator *de bonis non* of the estate. A copy of this order was served on the Fidelity & Deposit Company of Maryland. Plaintiff demanded a settlement of said Y. L. Yancy and J. W. Yancy, administrators, and the payment of any money that they might owe as such administrators, and the possession of such personal property as might be in their hands, but they refused to make any settlement with plaintiff, or to pay plaintiff any money, or to turn over to it any property belonging to the estate of W. L. Yancy. A copy of the inventory and appraisement was filed with the petition, and it shows that when the inventory was filed there were then in the hands of the administrators \$402.00 in money and \$578.37 in notes and other personal property.

To the foregoing petition the Fidelity & Deposit Company interposed a demurrer. Before the demurrer was acted on, plaintiff filed an amended petition, alleging in substance that the allegation of the original petition that the administrators had sold and disposed of the personal property and received the proceeds, was made through oversight and mistake of fact, and that the only knowledge or information plaintiff had in regard to the property was the inventory filed by the administrators; that plaintiff did not know and was not advised as to what disposition the administrators made of the personal property. It was further alleged that the insertion of the words "*de bonis non*," in the order appointing plaintiff administrator, was a clerical misprision, and that the county court had, by order, stricken out these words, and that, by the correction of that error, plaintiff was the only administrator of the estate of W. L. Yancy, deceased. The prayer was the same as in the original petition. The demurrer to the original petition was made to apply to the petition as amended and was sustained. Thereupon a second amended petition was filed, which set out with greater detail the facts stated in the original and first amended petition, and concludes with the following prayer: "That said defendants, Y. L. Yancy and J. W. Yancy, be required to answer and say what money or other property of the estate of W. L. Yancy came into their hands as such administrators, as well as the money

of said estate now in their hands as administrators, and to account for and turn over to this plaintiff all of said money and other property, and for judgment against all of the defendants for the said money and other property, including the property inventoried and appraised at \$980.37, and if any of said property cannot be had, for judgment for the value thereof, with interest at six per cent per annum from February 15, 1917, until paid, and its costs herein."

The action of the county court in striking out the words, "*de bonis non*," from the order appointing plaintiff administrator did not affect the relation which plaintiff sustained to the estate of the intestate. When the first administrators were removed and plaintiff was appointed administrator in their stead, it thereby became administrator *de bonis non* whether the words "*de bonis non*" were employed in the order of appointment or not. Hence, plaintiff's right to recover must be determined in the light of the fact that it is an administrator *de bonis non*.

The common law rule prevails in this state, and under that rule an administrator *de bonis non* can recover from his predecessor or his personal representative only such estate of the decedent as remained in specie, and cannot recover the proceeds of such as had been converted into money unless such proceeds were kept separate and were susceptible of identification. For assets wasted by the first administrator, the right of action is not in the administrator *de bonis non*, but in the distributees, heirs or creditors. 11 R. C. L., sec. 512. p. 420; Sec. 523, p. 426; Graves v. Downey, 3 Mon. 356; Lawrence v. Lawrence, Lit. S. C. 123; Warfield v. Brands' Admr., 13 Bush 77; Felts v. Brown, 7 J. J. Mar. 147; Karn v. Seaton, 62 S. W. 737; Boyd v. Immegart's Exr., 91 S. W. 1132. Hence, in order for an administrator *de bonis non* to recover of his predecessor and the surety on his bond, he must allege that his predecessor had in his hands unadministered assets in kind, or the proceeds of such as had been converted into money and kept separate and unmixed with those of his own. Here, the petition as amended, contained no such allegation. Hence, it was bad on demurrer and the trial court did not err in so adjudging.

Judgment affirmed.

Watson, By, etc. v. Watson, Guardian, et al.

(Decided March 7, 1919.)

Appeal from Lawrence Circuit Court.

1. **Guardian and Ward—Authority to Expend Property of Ward.**—A guardian may apply to a court of equity for authority to expend property of the ward, and if the facts authorize it the court has jurisdiction to direct it to be made.
2. **Parent and Child—Guardian and Ward—Use of Ward's Estate.**—While it is the duty of the parent to maintain, educate and support his child for whom he may be guardian, still, if the parent is in such needy financial circumstances as that he is unable to do so, he may use the ward's estate within the limits of the law for that purpose.
3. **Guardian and Ward—Use of Ward's Income.**—Where a ward is unable to labor for his support on account of his extreme youth, and it is shown that it is necessary to expend the whole of his income—which amounts to \$58.75 per month—for his support and education, the chancellor may direct and authorize the guardian to expend that amount for such purposes until the further orders of the court.
4. **Insurance—Payment of Debts Out of Proceeds.**—Where a testator in his will directed the payment of certain debts out of the proceeds of a life insurance policy which was at the time payable to his estate, and in the will stated that he would assign the policy to his son, which he afterward did, the policy will be held by the son burdened with the trust for the payment of the debts specified in the will.

A. O. CARTER for appellant.

F. M. VINSON and HAGER & STEWART for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

M. G. Watson died testate on December 26, 1914, a resident of Lawrence county, Kentucky. On July 14 and 15, 1913, he executed two papers which were probated by the county court of Lawrence county after his death as his last will and testament. His widow, the appellee, was made executrix of the will, and since her husband's death she has been duly appointed and qualified as guardian for her only child, the appellee, Morton Wall Watson, who, at the time of the rendition of the judgment herein, was about six years of age.

The appellee, as guardian for her infant child, as executrix of her husband's will, and in her individual capacity, filed this suit against her ward to obtain direc-

tions from the chancellor with reference to the disposition of the proceeds of a \$10,000.00 life insurance policy mentioned in the will, and to obtain permission from the chancellor to expend a certain amount of the income of her ward in payment of his board, maintenance and education. Perhaps other relief was also sought in her individual capacity, but no question relating to that is involved in this appeal. The judgment rendered upon final submission approved the expenditure of the proceeds of the life insurance policy as made by the executrix, and directed and authorized her as guardian to spend as much as \$58.75 per month in maintaining, caring for and educating the ward until the further orders of the court. Calling in question the correctness of the judgment, the guardian *ad litem* who was appointed for the ward prosecutes this appeal.

From the record it would seem that the testator held a number of insurance policies on his life, but the exact number of them, or their amounts, does not appear. It is shown, however, that at the time of the execution of his will he held a policy in the Home Life Insurance Company of New York for \$10,000.00, payable to his estate. He also held a policy in the New York Life Insurance Company which, upon his death, paid \$25.00 per month for a period of twenty years. He held stock in quite a number of undeveloped companies engaged in mining enterprises of different natures, some of which were oil companies, others coal companies, and something more than \$17,000.00 par value of stock in the Olive Hill Clay Products Company, a concern which we conclude from the record was organized for developing and manufacturing clay products. To pay for the stock in the Clay Products Company the testator had borrowed \$1,000.00 from his sister, Mrs. Stewart, for which he had executed his note, and \$5,000.00 from his mother-in-law, Mrs. Pennypacker, for which he had also executed his note, and to secure which he pledged his stock in that company, making thereon this endorsement: "This stock is security for a collateral note of \$5,000.00, and when the note is paid by insurance of my son, Morton Wall Watson, then he is to become the owner of same. M. G. Watson." Whether that endorsement was made before or after the execution of the will is not shown, but in the will the infant son is devised that stock. The will also includes this clause:

"Further, I will later assign ten thousand dollars (\$10,000.00) of life insurance (now payable to my estate) to my son, which insurance I wish to have applied, in part, to the payment of a debt against my clay stock, and such a part of the remainder as is necessary to the purchase of the corner store or brick building of the Gunnell block and the vacant lot and the lot and barber shop below that, with such room as necessary for ingress and egress for the convenience of said store, which store is located on the corner north of the Louisa National Bank, in Louisa, Kentucky."

Later on, in speaking of the same \$10,000.00 policy, the will says: "Then of the residue of the ten thousand dollars (\$10,000.00) such an amount as remains, to and including the amount of a note which I owe my sister (Mrs. F. L. Stewart) of one thousand dollars (\$1,000.00) I would want paid. This ten thousand dollars (\$10,000.00) namely from the Home Life Insurance Company policies; and in the event the ten thousand dollars (\$10,000.00) above referred to should not be sufficient to completely liquidate the indebtedness of the two properties," &c.

The two pieces of property referred to in the last quotation was property in which the testator owned only a one-fourth undivided interest. He directed his executrix to purchase the other three-fourths interest in one of the pieces and to sell his one-fourth interest in the other and to pay the difference out of the proceeds of the \$10,000.00 policy. As will be seen, he also placed the proceeds of that policy in trust for the discharge of the balance of the indebtedness which he owed to his mother-in-law and sister, as well as expressly placing in trust such proceeds for the payment of his mother-in-law's debt by the endorsement which he made upon the stock. After executing the will, and before his death, instead of assigning the policy to his son as he stated in his will he would do, he changed the beneficiary in the policy from his estate to his son, and conceiving that there might be some question as to her right to pay the proceeds of that policy as directed in the will after the change of beneficiary, the executrix is now asking the advice of the chancellor.

To state the proposition we think is sufficient to settle the right of the executrix to appropriate the proceeds of the policy toward the extinguishment of the two notes of the mother-in-law and sister, which at the time of the trial aggregated \$5,857.35.

If the testator in his will had said nothing about his contemplated assignment of the policy to his son burdened with the trust which he placed upon it in his will, there could be but little question that the change of beneficiary in the policy afterward was a change of his intention and a *pro tanto* revocation of the will. But having stated in his will his intention to assign that policy to his son, when he did so it was but a carrying out of the terms of his will and may be considered a part of it. So that when he subsequently changed the beneficiary in the policy so as to make it payable to his son (and which is tantamount to an assignment of the policy, having no greater force than an assignment) he was conforming his will to what he had therein stipulated he would do. We therefore have but little difficulty in concluding that the son as the new beneficiary in the policy took it burdened with the trust imposed by the will. Under this view the judgment approving the expenditures by the wife of the proceeds of the policy as the will directs was fully authorized.

As heretofore stated, a large portion of the testator's property was and is nonproductive. The income from all his productive property, including the \$25.00 per month from the New York Life Insurance Company, amounts to \$117.50 per month, and this income was devised by the will to the wife and son jointly for their maintenance and support. The testator owned no residence but lived with his mother-in-law, where his widow and son are now living.

Section 2032 of the Kentucky Statutes provides in substance that the guardian shall have the custody of his ward and the possession, care and management of his estate, and out of such estate shall provide for the necessary and proper maintenance and education of the ward. Section 2034 of the statute reads:

"No disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived:

1. "When the ward is of such tender years or infirm health that he can not be bound out as an apprentice, or no suitable person will take him as such.

2. "When it is best for the ward that the principal of his personal estate shall be applied for his board and

tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement."

Notwithstanding such provisions it is the settled rule that since there is imposed upon parents the natural duty to support and maintain their children, they may not as guardians for them be allowed anything out of the ward's estate for such purposes unless the parent is in such needy financial circumstances as that he is unable to do so. *Hughart v. Spratt*, 78 Ky., 313; *Overfield v. Overfield*, 17 R. 313, 30 S. W. 994; *Davis v. Richards*, 22 R. 590, 58 S. W. 477; *Hedges v. Hedges*, 24 R. 2220, 73 S. W. 1112; *Harper v. Payne*, Gdn., 24 R. 2301, 73 S. W. 1123; *Clay v. Clay*, 27 R. 1020, 87 S. W. 807.

The needy circumstances of the mother in this case are shown by uncontradicted testimony, and that this is true there can be no question. It is likewise established by the most convincing proof that the ward's one-half of the income (\$58.75) is barely sufficient to meet his necessities in the way of board, clothing, education and other supplies which one in his social circumstances needs and requires.

Courts of general equity jurisdiction within the limits prescribed by the statutory law of the forum, if there be any such law upon the subject, have general supervisory authority and jurisdiction over the persons as well as the property of all citizens who are under any legal disability. *Keegan's Gdn. v. U. S. Trust Co., &c.*, 182 Ky. 330, and *Fielder v. Harbison's Gdn.*, 93 Ky. 482. And if the chancellor would approve of an expenditure by the fiduciary for the benefit of the ward after it was made upon the ground that it was authorized by the local law, he may direct such expenditure in advance if the facts authorizing it are made to appear. Thus in the *Fielder* case, *supra*, this court says: "A guardian may exceed the income of the ward's estate when the ward is of such infirm health, or of such tender years, as requires the expenditure. This is a provision of the statute; but when authorized to make such an expenditure it is only so much of the income as is required on account of the condition of his ward."

Further along in the opinion, after referring to the case of *Withers v. Hickman*, 6 B. Mon., 292, in which it

was held that the guardian could not encroach upon the capital of the ward's estate in any event, the court said:

"This rule has been, to some extent, modified by the statute referred to, and in *Withers v. Hickman*, already cited, it was held that if the expenditures by the guardian would have been allowed by the chancellor if called on, then the guardian should be credited by it; and while this rule is equitable, it is best always to consult the chancellor before making extraordinary expenditures."

It will thus be seen that the court not only recognized the rule that the ward might consult the chancellor in advance as to the propriety of expenditures, but further, that it is the better rule in all cases to do so. Furthermore, in the instant case the sum asked for expenditures for the ward might well be considered as needed only for ordinary expenses, since it is shown by the proof—a fact which we know from current history—that the expenses of living are now extraordinarily high, and the small amount of \$58.75 can not be considered under present conditions as an excessive allowance for the support and education of the ward and to maintain him in the way and manner in which he should be reared. We therefore conclude that the court had the authority to direct the guardian to expend the present income of the ward for the purposes indicated, and the judgment so directing was correct. That judgment, according to its terms, is subject to modification at any time, to be governed by the changed circumstances.

Wherefore, the judgment appealed from in its entirety is affirmed.

Grau, et al v. Forge, et al.

(Decided March 7, 1919.)

Appeal from Campbell Circuit Court.

1. **False Imprisonment—Defenses.**—It is no defense to an action for false imprisonment that the defendant who made the arrest was acting under the directions of a superior officer, since the arresting officer must himself be authorized to make the arrest under some of the provisions of sec. 36 of the Criminal Code of Practice.
2. **False Imprisonment—Submission of Issue—Instructions.**—If the facts constituting the authority to make the arrest are disputed,

the issue should be submitted to the jury under instructions from the court; but if such facts are undisputed, it then becomes a matter for the court to decide, and where the undisputed facts show that the arresting officer in the exercise of a sound discretion had reasonable grounds to believe that the one arrested had committed a felony, it is the duty of the court to so direct the jury by a peremptory instruction.

3. Arrest—When Officer May Arrest Without Warrant.—Where one reports to an officer that another had just attempted to rob him, and gives a plausible and consistent account of the attempt, and there is nothing in the nature of the account to cause a reasonable person to question its accuracy, and soon thereafter the same person points out to the officer the one whom he claims attempted to rob him, the officer will be deemed to have reasonable grounds to believe that the one pointed out is guilty of a felony, and may arrest him without warrant.
4. Arrest—Force That May Be Used to Retain Custody of Prisoner.—An officer having a prisoner in charge whom he has lawfully arrested may use such force as is reasonably necessary to retain the custody of the prisoner, and may use such force as is necessary, or appears to him in the exercise of a reasonable discretion to be necessary, to defend himself from the dangers of an assault and battery committed upon him by the prisoner, but he must use no more force than above outlined in the defense of himself.
5. Arrest—Assault of Prisoner by Officer—Evidence.—Evidence examined and held that the officer was not authorized to assault the prisoner in his charge, either upon the ground that it was necessary to retain his custody, or to defend the officer from an assault committed by the prisoner.

BARBOUR & BASSMAN for appellants.

WILLIAM A. BURKAMP and PHIL. J. RYAN for appellees.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellant, Clifford Grau, was a policeman in the city of Newport, and had executed bond as required by law with his co-defendant and co-appellant, National Surety Company, as surety thereon. This suit was brought by appellee and plaintiff below, Albert Forge, against the policeman and his surety to recover damages for alleged false arrest and for damages resulting from an injury inflicted upon plaintiff by the policeman because of an alleged malicious assault and battery committed by him upon plaintiff after he was put under arrest.

The answer admitted the arrest, but justified it upon the ground that the defendant policeman had reasonable

grounds to believe when it was made that plaintiff had committed a felony, and the assault and battery was attempted to be justified because it was alleged that plaintiff tried to make his escape and first made an assault upon the officer; that no more force was used than was necessary to prevent the escape, or appeared in the exercise of a reasonable discretion to be necessary to save defendant from bodily harm threatened and about to be inflicted upon him by plaintiff. These defenses were put in issue, and upon trial there was a verdict and judgment in favor of plaintiff for the full amount sued for, \$1,000.00, and defendants' motion for a new trial having been overruled, they prosecute this appeal.

A number of grounds are relied upon as constituting prejudicial error sufficient to authorize a reversal of the judgment, but we deem none of them of such importance or materiality as to deserve our consideration except such as may be referred to during the progress of this opinion. Before taking up any of the grounds urged we think it necessary to make a substantial statement of the facts.

Plaintiff is about thirty years of age, a printer by trade, and resided in the city of Newport. On the Saturday night in question he went to the home of a friend where others had met and the crowd consumed a pitcher of beer, which, according to the proof, was but one glass each. They remained there and talked from about seven-thirty until after ten, when plaintiff and a companion started to the former's boarding house for the purpose of spending the night. On the way they stopped at a saloon and went in for the purpose of obtaining another glass of beer. While plaintiff was drinking it, defendant and another policeman arrested him. They had no warrant, and he had not committed any offense in their presence. They started with him to police headquarters, and according to plaintiff's testimony when they had gone something like a square defendant struck plaintiff in the mouth with such force as to loosen some of his teeth and bruise his lips and gums, causing them to bleed quite freely. The force of this lick, according to plaintiff's testimony and that of his witness, was sufficient to cause him to fall to the walk but for the support of the defendant and a fellow policeman, between whom he was walking. A short distance further along on the route, according to plaintiff's proof, defendant struck him another blow by the side of the head, and it was

as severe as the first one. When they arrived at police headquarters the officer in charge, after questioning plaintiff and his witness and others professing to have any knowledge upon the subject, released plaintiff, which ended the matter, there being no further prosecution.

But a short while before the arrest one Harvey Sipple, a boy about fifteen years of age, who lived at Newport, stated to the officer in charge of the police headquarters (and who was superior to plaintiff) that some one had attempted to rob him on Fifth street. He went into detail about the supposed felon, who, as he stated, inquired of him if he had any money, stating that he, the felon, wanted it, and made an effort to get to his pockets, but the witness escaped and ran up the street with the supposed robber pursuing him. Witness eluded the robber, but related his story to a policeman by the name of Armstrong, who advised witness to look around and see if he could locate the man who had attempted to rob him, which he did, and pointed out plaintiff, who was in the saloon referred to, as being the guilty person. Witness and Armstrong immediately went to police headquarters where, after making his statement, defendant and another policeman were detailed to make the arrest, and they went with the witness, Sipple, to the saloon where plaintiff was pointed out to defendant as the guilty person, whereupon he was arrested, as hereinbefore stated. On that occasion Sipple was not only positive of plaintiff's guilt, but upon the trial of this case he was firmly of the opinion that plaintiff was the man who tried to rob him.

It is first insisted that a peremptory instruction should have been given to find for defendants upon that branch of the case complaining of the false arrest upon the two grounds (a) that defendant, in making the arrest, was acting under the direct orders of a superior officer, and (b) that the uncontradicted facts show that he had reasonable grounds to believe plaintiff guilty of a felony.

[In support of the contention (a) it is urged that an inferior police officer is bound to obey the orders and directions of his superior, and that in doing so he is not amenable to the person arrested, although the arrest was wrongful and without warrant of law, and this conclusion is sought to be drawn by analogy from that principle of the law which excuses an individual from liability

when called upon by an officer to assist in making an arrest, although the officer was proceeding without authority, and some cases in other states, as well as those of *C. N. O. & T. P. Ry. Co. v. Cundiff*, 166 Ky. 594, and *Franks v. Smith*, 142 Ky. 232, from this court, are relied upon. We do not doubt the principle of law which under the circumstances mentioned excuses a private citizen from liability however wrongful the arrest might have been, but that principle can not be extended so as to protect an officer, although subordinate to another, who directed the arrest. The precise point was determined contrary to the contention here made in the case of *Leger v. Warren*, 62 Ohio State 500, 51 L. R. A. 193, and substantially so by this court in the case of *Franks v. Smith*, *supra*. Aside from these express determinations of the question, the two situations are by no means analogous. When a citizen is called upon to assist an officer in making an arrest the law makes it his duty to obey and act at once, and he is justified in assuming that the officer is acting within his official duties and under authority duly conferred by the law. To permit a citizen in such cases to delay the arrest by withholding his assistance until he can satisfy himself of the legality of the officer's proceeding would frequently result in the escape of criminals and would seriously retard the enforcement of the law. Not so with an officer. He is conclusively presumed to know his duty and to refrain from acting outside of such duty. The announcement of such a principle of law as contended for would greatly imperil the liberties of the citizens and would in almost every case render the arresting officer immune from the consequences of his unlawful arrest, since it could be easily shown that some officer other than the one making the arrest had given the defendant orders to make it. We therefore conclude that the court did not err in declining to give the instruction based upon this contention.]

Briefly considering ground (b) insisted upon, sec. 36 of the Criminal Code of Practice authorizes an officer to make an arrest (1) in all cases where he has a warrant of arrest duly issued by a proper officer: (2) without a warrant when a public offense has been committed in his presence; and (3) without a warrant when he has reasonable grounds for believing that the person arrested has committed a felony, although not in his presence.

In this case, as we have seen, the defendant had no warrant, nor had the plaintiff committed any offense in his presence, and so if there was any authority for the arrest it was upon the (3) ground stated; i. e., that defendant had reasonable grounds to believe that plaintiff had committed a felony. If the facts constituting the reasonable grounds for belief upon which the defendant acted in making the arrest were in dispute, there could be no doubt but that the jury should pass upon that question under proper instructions. But there is no dispute in the testimony about the facts constituting such grounds for believing the plaintiff guilty. Nobody denies but that the witness, Sipple, made the report to defendant and to police headquarters which we have hereinbefore set out. It was apparently both sincere and credible. No fact or circumstance appears which would cause a reasonable person to doubt the correctness of his story. It was not only plausible, but he actually pointed out to the officer the man who he said attempted to commit the robbery, which attempt, as is well known, is itself a felony.

The case of *Johnson v. Collins*, 28 Ky. Law Rep. 375, is one very similar to this in its facts. A negro girl was shot while standing in the door of the house occupied by the person afterward arrested, who, with another, was in the house at the time. They stated that the girl had accidentally shot herself while handling a pistol, but another person who saw the girl killed afterward stated to the officers that the girl did not shoot herself accidentally or otherwise, but that the shot came from within the house, upon which information the arrest was made without a warrant. Upon trial the arrested person was acquitted and afterward brought suit against the policeman for false arrest and imprisonment. The jury returned a verdict for the defendant and plaintiff prosecuted an appeal to this court and the judgment was affirmed, the court in the course of the opinion saying: "We think the undisputed facts in this record show that the chief of police had probable cause to arrest the appellant on the charge of murder." It is true that no peremptory instruction was given in that case, nor does it appear that any was asked, and the issue as to reasonable cause for defendant's belief that plaintiff had committed a felony was submitted to the jury under instructions which this court approved, and we have no doubt,

from the quotation made from the opinion that the court would have upheld the verdict had it been returned under an instruction expressly directing it. Since, however, there was a verdict for the defendant, and he was not in this court making the question of the propriety of the peremptory instruction in his favor, that question was not passed upon.

In 11 R. C. L. 801, the rule which should apply to the arresting officer in cases like this is thus stated: "But since in such a case the person to be arrested is not specifically indicated by a written warrant, and the officer must necessarily act on his own reasonable judgment and often in haste to prevent the escape of the criminal, he is protected if he acts in good faith and on reasonable grounds of suspicion, though the person arrested proves not to have been the felon, or no felony was in fact committed."

Suits for false arrest and imprisonment are very similar in their nature to those for malicious prosecution. The chief difference in the two cases consists in the persons proceeded against. In the one case the defendant is the person making the arrest, while in the other he is the one who sets the law in motion and causes the arrest to be made. In the latter class of cases this court has without exception held that where the facts constituting probable cause are in dispute the issue should be submitted to the jury under an appropriate instruction, but where the facts alleged as constituting probable cause are undisputed, it becomes a question of law for the court. *Lancaster v. Langston*, 18 Ky. Law Rep. 297; *Moore v. Large*, 21 Ky. Law Rep. 409; *Metropolitan Life Insurance Co. v. Miller*, 24 Ky. Law Rep. 1561; *Providence Savings Life Assurance Society v. Johnson*, *idem*. 1902; *Lancaster v. McKay*, 103 Ky. 616, and *Bruce v. Scully*, 162 Ky. 296. In the last case referred to, upon this precise point the court said: "But where the facts are undisputed and as in this case are admitted by the appellant herself, there can be nothing to submit to a jury upon the question of probable cause but it becomes a matter exclusively for a decision of the court." The court then refers to the case of *Farris v. Starks*, 3 B. Monroe, 4, where the same rule is announced, and concludes that since there was no dispute about the facts the court properly directed a verdict for the defendant upon the ground that the undisputed facts constituted probable cause. Numerous other

cases from this court might be cited in substantiation of the same proposition.

If in cases like this an officer, who must necessarily act with more or less haste in order to prevent a possible felon from making his escape, would have to satisfy himself beyond question that a felony had been committed, or must act at his peril, the great public necessity for a prompt and rigid enforcement of the law would be largely curtailed. In announcing this principle we would not be understood as endorsing any rule that would license the officer under such circumstances to act upon unsubstantial appearances or unreasonable stories, but when the facts are such as a reasonably prudent man would have believed plaintiff guilty and would have acted upon we think the officer is authorized to make the arrest, although as a matter of fact it might subsequently turn out that no offense had been committed, or if one that the person arrested had no connection with it. We have no doubt that public policy is better served under such a rule than it would be to require the officer to act at his peril. We therefore conclude that the court should have directed the jury to find nothing for the alleged false arrest, and consequently it was in error in submitting to the jury the question of whether the defendant had reasonable grounds to believe that plaintiff had committed the felony.

This leaves in the case only the cause of action based upon the unlawful assault and battery committed upon plaintiff by the defendant. Upon this branch of the case it is insisted that the court erred in not giving to the jury an instruction upon the right of the defendant to defend himself against an assault committed upon him by plaintiff. The reason why the court refused to give that instruction to the jury is not stated in the record, but we think his declining to do so was authorized upon the ground that there was no evidence to sustain it. It is true that defendant claims in his testimony that plaintiff used insulting language and struck at but missed him when defendant struck the blow about which complaint is made. Neither of these reasons furnish legitimate grounds for the assault and battery complained of. It is a well known principle of law that insulting words furnish no defense for an assault and battery, although such insulting words might mitigate the damages. Neither do any facts appear showing that defendant was in any

danger of any character of bodily harm from anything which plaintiff did, even if it be admitted (which is strenuously denied) that plaintiff struck at defendant while under arrest. At that time there was a policeman on either side of him, holding both his arms, and no reasonably prudent person could conclude that he was in any danger of bodily harm at the hands of plaintiff situated as he was at the time. Nor do we find any fact in the record which would in the least justify the assault upon the ground that it was necessary to retain the custody of plaintiff or to prevent his escape, since he was making no effort to escape. Upon another trial, if the evidence is substantially the same as upon this one, the court will submit to the jury only the amount of damages which plaintiff sustained, if any, by reason of any assault and battery committed by the defendant, Grau. But if the evidence should justify it, of course the self-defense instruction should be given.

Wherefore, the judgment is reversed, with directions to grant a new trial, and to proceed in accordance with this opinion.

Penn's Administrator v. Bates & Rogers Construction Company.

(Decided January 28, 1919.)

Appeal from Mason Circuit Court.

1. Master and Servant—Constitutional Law—Workmen's Compensation Act—Validity.—Notwithstanding section 241 of the Constitution, providing that whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, damages may be recovered for such death, and until otherwise provided by law, the action to recover such damages shall be prosecuted by the personal representative of the deceased, a servant may voluntarily accept provisions of the Workmen's Compensation Act, fixing the amount of recovery in case of death.
2. Master and Servant—Workmen's Compensation Act—Action for Damages—Rights of Servant.—Since the Workmen's Compensation Act provides for compensation for death in lieu of all other liability, an administrator of a deceased servant, who had accepted the provisions of the act, cannot maintain an action for damages.

H. W. COLE and A. D. COLE for appellant.

STANLEY F. REED for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

William Penn, as administrator of Harvey Penn, brought this suit against the Bates & Rogers Construction Company, a corporation, to recover damages for his death. The petition alleged facts showing that the death of the deceased was caused by the gross negligence of the defendant, its agents and servants. The petition further alleged that the deceased had signed a contract, electing to receive benefits under the Workmen's Compensation Act, and that the defendant had also accepted the provisions of that act. A demurrer was sustained to the petition and the petition dismissed. Plaintiff appeals.

Section 241 of the Constitution is as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

Plaintiff contends that this section of the Constitution gives to the administrator of an employe, whose death resulted from an injury inflicted by the negligence or wrongful act of another, an absolute right of action which the employe himself could not contract away by agreeing to accept, in lieu thereof, the benefits provided by the Workmen's Compensation Act. We do not deem it necessary to discuss the question further than to say that it was fully considered by the court in the case of *Kentucky State Journal Co. v. Workmen's Compensation Board*, 162 Ky. 387, 172 S. W. 674, where, in response to the petition for a rehearing, we delivered an extended opinion stating our conclusions in the following language:

"Second. Any employe, coming within the provisions of the act, may voluntarily agree to accept its provisions, fixing and limiting his recovery in case of injury.

"Third. He may likewise voluntarily accept the provisions of the act, fixing the amount that shall be recovered in the event of his death, and said sum should be

paid to his dependents, if he leaves any, and if not, to his personal representative."

Since the deceased had the power, by voluntary contract, to accept the provisions of the act, fixing the amount that should be recovered in the event of his death, and since the compensation for death provided by the act is in lieu of all other liability, it necessarily follows that the act controls, and that an action for damages will not lie. Hence the demurrer to the petition was properly sustained.

Judgment affirmed.

Turner, Day & Woolworth Handle Company v. Allen.

(Decided January 28, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas, First Division).

Master and Servant—Safe Place to Work—Assumption of Risk.—While it is the duty of the master primarily to exercise reasonable care to provide the servant with a safe place in which to work, and with safe tools, appliances and materials with which to work, the negligence between the master and servant must be measured by the character and inherent dangers of the work engaged in, and in accepting an employment the servant assumes all the ordinary and usual risks which are incident to the work, and which arise from a known and obvious danger.

FRED FORCHT and CHARLES W. MORRIS for appellant.

ELMER C. UNDERWOOD for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

The appellee, John W. Allen, was an employe of the appellant, Turner, Day & Woolworth Handle Company, which was a corporation and engaged in the business of making wooden handles for hatchets, hammers, axes, and other tools. The process of making the handles, was as follows: the timber was received by the appellant, in logs, and was then, cut by a saw, into billets of the proper length and dimensions, for the making of the kind of handles desired, and the sawyer would endeavor to so cut the timber, as to not include, in a billet, any knot or defect in the timber, which would obviously render it unfit to be worked into a handle on account of its poor

quality. The billets were all thrown together, by the persons engaged in the sawing, and when handles of a certain class were desired, two employes would go through the billets and select the billets, suitable for making the handles of the class desired. These employes were called "graders," and the service performed by them, was denominated, "grading" the billets. The appellant manufactured several classes of handles, which were distinguished from each other, by the quality of the timber out of which each class was made. One or more classes were made out of billets, which were free from knots, as well as other defects, while there were other classes of handles, which were made out of billets, containing knots, and another class was made exclusively of billets, which had knots in them. A large open knot rendered the billet a "cull" and unfit for making a handle on account of the poor quality of the timber and the graders, as well as the lathe men, were directed to reject them, but the billets, containing knots, other than open ones were worked into handles. After the billets were "graded," they were carried to the lathes to be turned into handles. The lathes had circular saws about ten inches in diameter, and clamps, for securing the billet for the operation of the saw. The appellee had been in the employment of the appellant for eight years, and five years of that time, he had charge of the operation of a lathe, and hence, was an experienced man, in the operation of a lathe in making handles of all kinds, and was well acquainted with the manner of doing the work of that kind, at appellant's establishment, and of all the dangers and risks incident to that character of work. It seems, that in the work of operating the lathe, the appellee, performed all the duties attached to it. He adjusted the billets to the machine, and took the billets from where they were placed, for the purpose of being operated upon, and placed them, in the machine. On the 10th day of December, 1915, he claims, that while operating the lathe, he placed in it, a hickory billet, about fourteen inches in length and three inches in width, and the same in thickness, and there was in the billet, a knot, about the size of a dime, which penetrated the wood from one side to the other, about four inches, from the end of the billet, which was intended to be sawed into the "eye" of the handle. When the saw came in contact with the knot, the billet was broken at the knot, and the larger portion was

thrown out, with great force and struck him upon the side, just above the right hip. He claims, that this occurred on Saturday afternoon and rendered him unable to continue the work, further, on that evening, and gave him great pain, but, that he returned to work on the following Monday, and thereafter, continued to work, at the lathe, but, not all the time, until about the middle of the following April or May, when he was no longer able to do that kind of work, and quit and secured a less onerous character of employment. He never, at any time, made any report or complaint to the appellant, of his injury. He claims, that the force of the blow upon his side caused injury to him, internally, and resulted in the creation of an abscess within his body, at that point, but, of which there is no visible evidence. He instituted this action, in October, 1916, and upon a trial, recovered a verdict and judgment for the sum of \$700.00. The appellant's motion for a new trial was overruled, and it has appealed, and assigns as prejudicial errors of the trial court, that it overruled its motion for a directed verdict in its favor at the conclusion of the evidence offered by appellee and at the conclusion of all the testimony, and misinstructed and refused to properly instruct the jury.

The claim by appellee for damages, is asserted upon the grounds, that the appellant negligently furnished him a billet, to be turned into a handle, which contained a knot, and the attempt to make a handle from it, was dangerous, on account of the knot in it, and that appellant knew or by the exercise of ordinary care, should have known of the dangerous character of the billet, and that he did not know of its unsafe and dangerous character when he placed it in the lathe. The appellant traversed the averments in the petition, and interposed pleas of contributory negligence and assumed risk.

(a) The appellee, after testifying, that he had worked for appellant in the operation of a lathe and engaged in turning handles for five years, before he received the alleged injury, further, testified, that he did not see and did not know, that the billet, which injured him, contained a knot, when he placed it, in the lathe; that such a knot in a billet, rendered it dangerous to be put in the lathe; that when he began to work at a lathe and turn handles, the foreman said to him, in substance, that if he saw a knot in a lathe, to throw it aside; that, however, he had frequently put billets in the lathe,

which contained knots, and did so, when the knot was not so large in size, as the one complained of; that frequently, billets, on account of containing knots, were thrown out by the lathe, in the same way the one complained of was thrown out; that this had occurred, sometimes, once a day and sometimes, more often; that on these occasions, the billets had struck him on the hands, arms, and other portions of his body, but, that the time, he suffered the injury, was the first time, a billet had been thrown out, by reason of a knot, and struck him at the point, where the one complained of, struck him; that often times, the knots, in the billets, did not cause them to fly out of the machine, but, they worked through all right, but the knots, in other billets would cause them to fly out. He does not testify, that the billets, upon which he was working, at the time of his injury, were to be turned into the class of handles, which were to be free of knots, and in fact, declined to make such statement; and he does not testify, that it was the duty of the "graders" to make an inspection of the billets, for the purpose of rejecting those, which contained knots, but, his testimony shows, that the billets with knots in them, were turned in the lathe, with his knowledge, and that in his work, he did so frequently, and had been oftentimes struck by billets, which the knots caused to fly out of the machine. Hence, considering all of his testimony, together, the only conclusion which can be arrived at, is, that he knew, that there was no inspection made of the billets for the purpose of finding and rejecting all of those, with knots, in them; that the billets contained knots, when they were brought to the lathe and placed in it; that the business, in which he was engaged was in part to turn billets, with knots in them; and that, if a prudent man, he must reasonably expect, that the billets or some of them, would contain knots, and under such circumstances, if the full meaning is given to his statement, that he had been directed, five years before, to reject the billets, in which he should see knots, and considering the statement to be true, it would appear, that it was made his duty to inspect the billets for knots, and to reject such as he thought would be dangerous to put in the lathe, as he testifies, that he did put into the lathe, the billets, which contained knots, as large as a lead pencil, as he did not regard such knots as dangerous. The other evidence offered by him as to the duties of the "graders," was

not contradictory of the evidence given by himself, and proved, that it was not their duty to reject billets, on account of the knots in them, unless the knots were so large, as to render the billets unfit for the making of a handle of any class, and such as the sawyer should have cut out. The evidence offered by the appellant upon the subject of the "graders' " duty, agrees, with that, offered by appellee, to the effect, that it was the duty of the "graders" to reject the billets, which contained large, open knots, only, and therefore, unfit to be made into a handle of any class.

(b) It may be conceded, that it is the primary duty of the employer to exercise reasonable care to furnish his servant with a reasonably safe place in which to work, reasonably safe tools, machinery and appliances, with which to do the work, and reasonably sound and safe materials to be worked. This principle is well established, and in regard to its soundness, there is now no dispute, but, as a part of the law regulating the rights of master and servant, is the principle, that while a servant in accepting an employment, does not assume any extraordinary and unusual risks, he does assume all the ordinary and usual risks and perils, which are incident to the employment, and all risks of which he has knowledge, which attend such an employment, and any risk incident to the employment, which arises from a known or obvious danger in performing the service. The master is not an insurer of the safety of the servant, and the negligence, as between him and the servant, must be measured by the character and danger of the business engaged in. The fact, that the work in which the servant is employed, is hazardous, does not relieve him from the assumption of risks, which are obvious or incidental to the work, as the servant has a right to accept and engage in a hazardous employment, if he desires to do so. *Nichols v. Abadie*, 124 S. W. 325; *Young v. Norfolk & Western Ry. Co.*, 171 Ky. 517; *L. & N. R. R. Co. v. Foley*, 94, Ky. 224; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 386; *Buey's Admr. v. Chess & Wymond*, 85 S. W. 563; *Flaig v. Andrews Steel Co.*, 141 Ky. 391; *Goss v. Kentucky Refining Co.*, 137 Ky. 404; *Wilson v. Chess & Wymond Co.*, 117 Ky. 567; *C. & O. Ry. Co. v. McDonall*, 16 Ky. L. R. 1; *Ky. Freestone Co. v. McGee*, 118 Ky. 306; *Louisville Ry. Co. v. Bocock*, 107 Ky. 223; *Ashland Coal & Iron Co. v. Wallace*, 101 Ky. 626; *Greer v. Louis-*

ville Ry. Co., 94 Ky. 169; Louisville Ry. Co. v. Milliken, 21 K. L. R. 489; Ohio Valley Ry. Co. v. McKinley, 17 K. L. R. 1028. Hence, the master does not insure the servant against the results of injury, which arises from a danger, inherent in the work, in which the servant is engaged, and which is known to the servant, and obvious to him. The risk, which the appellee in the instant case, underwent, from a billet, with a knot in it, being thrown out of the lathe, seems to have been one of the incidents of the work of operating the lathe, and well known to the appellee. The turning of handles out of billets, containing knots, was the business, which appellee undertook to perform, as well as the business of turning them out of billets, which did not contain knots. Billets were cast out by the machine for various reasons, besides that of having knots in them. The appellee, therefore, failed to show a case, which entitled it to submission to the jury, and the court should have sustained the motion for a directed verdict in favor of the appellant.

The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

Wilson v. Carrollton Leaf Tobacco Warehouse Company.

(Decided February 4, 1919.)

Appeal from Carroll Circuit Court.

1. Trial—Transfer of Causes.—Where plaintiff sues on a long and complicated account growing out of a contract, the defendant is entitled to a transfer of the cause to the common law docket, where the account is admitted by a failure to deny, and the answer, set-off and counterclaim present three distinctly legal issues triable by a jury.
2. Trial—Transfer of Causes—Motion for Transfer—When Seasonably Made.—A motion for transfer of a cause to the common law docket for trial of legal issues is seasonable, when made within a reasonable time after the filing of the pleading tendering the issues.

F C. GREENE and J. A. DONALDSON & SONS for appellant.

WINSLOW & HOWE for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

On October 18, 1910, J. W. Wilson and the Carrollton Leaf Tobacco Warehouse Company entered into a written contract, by the terms of which Wilson agreed to sell all the tobacco he bought or controlled during the season of 1910-1911 over the floor of the warehouse company, and the warehouse company agreed to pay for said tobacco so bought and delivered. The contract further provided that the warehouse company was to have full fees for the selling of the tobacco, and that settlements were to be made at the expiration of each week's sales, and that Wilson was to have all profits and to pay all the losses to the warehouse company,

On March 4, 1912, the warehouse company brought suit to recover the sum of \$1,065.92 alleged to be due under the contract. While the petition was in ordinary, the action seems to have been entered on the equity docket. Thereafter, the pleadings in the case were lost and the case was referred to the master commissioner for the purpose of supplying the lost papers. On February 1, 1915, plaintiff, together with James F. Jett, its trustee, filed an amended petition making Jett, trustee, a party plaintiff. With the amended petition, an itemized statement of the account between plaintiff and defendant was filed, showing a balance due plaintiff of \$994.61, for which judgment was asked. At the April term, 1915, the defendant filed an answer, set-off and counterclaim in four paragraphs. In the first paragraph, he denied that the plaintiff had sold its assets to James F. Jett, as trustee. In the second paragraph, he pleaded that for a period of six months during the season of 1910-1911 he worked for and assisted plaintiff in making sales and securing good prices for tobacco, and that his said services were performed at the special instance and request of plaintiff and were reasonably worth the sum of \$165.00 per month, which plaintiff promised to pay. In paragraph three, he pleaded that at the special instance and request of plaintiff he employed men to assist him in the work, and paid them the sum of \$75.00, which sum plaintiff agreed and promised to pay to the defendant. In paragraph four, he pleaded that he delivered to plaintiff nine thousand pounds of tobacco at the value of \$1,080.00, which plaintiff never accounted for. At the August term, 1915, plaintiff demurred to each paragraph of the answer, set-off and counterclaim, and the demurrer was overruled. At the same term, the defendant moved

to transfer the action to the common law docket. This motion was subsequently overruled and an exception saved by the defendant. Upon completion of the issues, the motion was renewed and again overruled, to which an exception was saved. Later on the case was referred to the master commissioner over the objection of the defendant. The commissioner filed a report rejecting the items set up in the answer, set-off and counterclaim of the defendant, and finding that the defendant was indebted to plaintiff in the sum of \$994.61. This report was subsequently confirmed and judgment entered accordingly. The defendant appeals.

The refusal of the trial court to transfer the case to the common law docket is the chief ground urged for a reversal. As justifying the action of the court, it is argued that the suit involved mutual and complicated accounts, and was therefore properly triable in equity. As a matter of fact, however, not a single item of the lengthy account filed with the petition was contested. On the contrary, the items embraced in the account were admitted by defendant's failure to deny them. With these items eliminated, there was left no issue of equitable cognizance. There remained only three distinctly legal issues which the defendant had the constitutional right to have tried by a jury, provided the motion to transfer was seasonably made. *Carder, et al. v. Weisengburg*, 95 Ky. 135, 23 S. W. 964.¹ Of this there can be no doubt, because the motion was made within a reasonable time after the filing of the pleading tendering the issues. *Lewis v. Helton*, 144 Ky. 595, 139 S. W. 772. It follows that the trial court should have transferred the case to the common law docket.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

ON PETITION FOR REHEARING.

1. **Pleading—Estoppel—Reply—Sufficiency.**—In an action on an account, the allegations of the reply held insufficient to constitute an estoppel against certain claims set up in the answer, counterclaim and set-off.
2. **Account—Action On—Pleading—Answer and Counterclaim.—Inconsistent Position.**—A party cannot admit the correctness of an account and at the same time insist, by way of counterclaim, that

certain credits were omitted which would necessarily render the account incorrect.

3. Account—Action On—Set-off—Inconsistent Positions.—Where an account stated had no connection with certain claims for services rendered and expenses incurred under an oral contract of employment, defendant's admission of the correctness of the account did not preclude him from relying on his set-off for such services and expenses.
4. Appeal and Error—Legal Issues—Jury Trial—Denial of Right—Error.—Where defendant's answer and set-off presented two legal issues which he had the right to have tried by a jury, the denial of the right was prejudicial error.

F. C. GREENE and J. A. DONALDSON & SONS for appellant.

WINSLOW & HOWE for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Modifying former opinion and overruling petition for rehearing.

In its petition for rehearing, appellee contends that the court failed to give proper effect to its reply pleading estoppel against the claims set up in appellant's answer and counterclaim, it being argued that the reply set up a complete defense, and that being true, there were no common law issues to be submitted to the jury. The reply is as follows:

"For further reply, herein to the entire answer, counterclaim and set-off of the defendant as amended, plaintiff says:

"That during all the times referred to in plaintiff's petition as amended and in defendant's answer, counterclaim and set-off, the plaintiff, the Carrollton Leaf Tobacco Warehouse Co., was engaged in selling loose leaf tobacco in Carrollton on commission on the open market; that it was at said time and place the rule, custom and habit and practice of all the tobacco trade (including the plaintiff) engaged in conducting sales of loose leaf tobacco in Carrollton on commission that whenever any person delivered tobacco to the warehouse to be sold, to weigh the same in due course of business in the presence of the same and to immediately give to the person so delivering the tobacco, a written statement of the number of pounds so delivered, and the date of delivery, and the owner or person delivering the tobacco had the right to demand said written statement, and plaintiffs say that the defendant, Wilson, knew well of this rule, habit and custom and practice, of his right to have such written

statement delivered to him, and the plaintiff says that such statements were made out for delivery to said Wilson and if he failed to get them it was by reason of his own negligence and his failure to demand and get them.

“ ‘That it was likewise the rule, custom, habit and practice of all persons, including plaintiffs, in Carrollton, engaged in the business of conducting sales in loose leaf tobacco on commission, whenever any tobacco was sold on the floors of said warehouse to give both the seller and the buyer a written statement showing the number of baskets of tobacco, that were sold, the number of pounds in each basket, the quality of the tobacco and the price at which the same was sold, and the amount of commission for making the sale, upon each day of sale to make settlements in actual cash or check, with both the purchaser and the seller, including defendant, unless the said purchaser or seller was running a regular account with the warehouse, in which event the said purchaser would be charged with the amount purchased and the seller credited with the net proceeds of the sale and the patron, whether seller or purchaser, or both, was thus enabled to keep an accurate account of all his purchases and sales, or either of them, and to know exactly the amount of tobacco held by the warehouse for the patron at the close of each day, and it was the right and custom of all patrons, including the defendant, to get such statements.

“ ‘That this habit, rule, custom and practice, and right was well known to the defendant, and plaintiffs say that said written statements or accounts were made for and delivered to defendant or that if he failed to get the same, it was because of his own neglect.

“ ‘That at various times during the times embraced by the account sued on herein by plaintiffs, settlements were made between plaintiffs and defendant and at no time until after the institution of this action did the defendant make any claim upon plaintiff for any of the amounts sued for in his counterclaim and set-off, nor did he in any wise until then, make any pretense to having any counterclaim or set-off of any kind whatever against plaintiff.

“ ‘Plaintiff says that it was the duty of the defendant during the time of the incurring of these mutual accounts to notify the defendant, if he was in any wise dissatisfied with the manner in which the plaintiff was conduct-

ing the business, including the keeping of the accounts, and not wait until a fluctuating market would disclose whether or not the defendant would make or lose money by trading with the money of plaintiff and the defendant having failed to notify plaintiff of his pretended claims until after the close of the market for that season, waived his right thereto, if any he had, and is estopped from setting up any of the claims attempted to be set up in his answer, set-off and counterclaim as amended, and plaintiff now pleads and relies on each of said acts of defendant as an estoppel in bar of each and all of said claims.' "

In our opinion the reply does not allege facts sufficient to constitute an estoppel. It merely alleges such conduct on the part of appellant as tends to discredit the justness of the items embraced in his counterclaim.

However, we conclude that the trial court erred in not sustaining the demurrer to paragraph four of the amended answer and counterclaim, which sought a recovery for the 9,000 pounds of tobacco which it is alleged appellee failed to account for. Our reasons for this conclusion are as follows: Appellee sued for a balance due under a stated account, showing in detail the various sums advanced by appellee to appellant, and the various payments made by appellant to appellee. Appellant failed to deny the correctness of any item embraced in the account, or the correctness of the balance due under the account. Manifestly, if the account was correct, there was no tobacco unaccounted for. A party cannot admit the correctness of an account and at the same time insist, by way of counterclaim, that certain credits were omitted which would necessarily render the account incorrect. Under this view of the case, the claim for the 9,000 pounds of tobacco unaccounted for is eliminated from the case, and appellant is not entitled to have this claim tried by a jury.

With respect to appellant's claim for services and expenses, a different state of case is presented.

The account sued on purported to deal only with matters arising under the written contract, and had no connection with appellant's claim for services rendered and expenses incurred under his oral contract of employment. That being true, appellant's admission of the correctness of the account sued on did not preclude him from relying on his set-off for such services and expenses. Hence,

there remained two legal issues which the appellant had the right to have tried by a jury, and the denial of this right was prejudicial error.

Wherefore, the opinion is modified as above indicated, and the petition for rehearing is overruled.

Harris v. Commonwealth.

(Decided February 7, 1919.)

Appeal from Mason Circuit Court.

1. **Criminal Law—Defense of Insanity.**—Testimony by defendant that he did not consciously kill his victim, against whom it is proven without contradiction he entertained malice or ill will, is of probative value only in support of the defense of insanity to show the absence of any motive whatever, but has no probative value to show the absence of malice merely of a sane person.
2. **Homicide—Drunkeness—Evidence.**—Evidence of drunkeness upon the part of one accused of murder, even where malice is proven, is admissible as part of the *res gesta*, for consideration of the jury in determining whether the punishment should be death or only life imprisonment, but it can not reduce murder to manslaughter where pre-existent malice toward the deceased is proven, and may have that effect only where there is no proof, but merely a legal presumption, of malice.
3. **Homicide—Drunkeness—Evidence.**—An instruction upon manslaughter is not authorized by evidence of drunkeness upon the part of the defendant who killed without justification one against whom he is conclusively proven to have entertained a settled ill will or malice.

A. D. COLE, H. W. COLE and J. G. WADSWORTH for appellant.

CHARLES H. MORRIS, Attorney General, and HENRY F. TURNER, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

This is an appeal from a judgment imposing upon appellant the death penalty for murdering his wife, from whom he had been separated for about two months, and who, about three weeks previous to the homicide, had him arrested and fined in the police court for "beating her up."

The homicide by defendant, thoroughly established and brutally committed, is not denied, or its justification attempted by him in his testimony, his only defense being

that from insanity or drunkenness or both, he did not knowingly do it, and had no recollection or knowledge of what he did that day from more than an hour before the killing until some six or seven hours thereafter.

The court gave instructions upon murder and insanity, but did not instruct upon manslaughter. It is insisted that the failure to instruct upon manslaughter was prejudicial error, and this is the chief reliance for a reversal, although the instructions upon insanity are criticised, and we shall first dispose of these criticisms.

1. The two instructions given submitting the defense of insanity are literal and exact copies of the instructions set out in full and approved by this court in *Mathley v. Commonwealth*, 120 Ky. 389, and numerous cases therein cited, as well as in *Hobson's Instructions*, sec. 720, with the single exception that the name of the deceased is changed, so that we do not feel that it is necessary or proper to copy or discuss them in this opinion. No objection is urged against them now that has not been considered and held without merit heretofore by this court, unless it be that it is error to refer to the *shooting* by the defendant as the *killing*, which objection so far as we have noticed has not been urged against them until now, but the criticism is entirely without merit because death was instantaneous, and there is no substantial difference under such state of case in the meaning of the two terms.

2. The question of whether or not the court should have given an instruction upon the question of manslaughter, is much more serious and requires, preliminary to its decision, a consideration of the probative value of evidence upon the question of drunkenness, as affecting defendant's motive in killing his wife.

This evidence is divisible into three separate and distinct classes: (a) evidence by the Commonwealth of pre-existent and premeditated malice; (b) evidence by defendant and his mother as to his insanity at the time he killed his wife, and (c) evidence by the defendant and others that at the time of the homicide he was under the influence of intoxicants voluntarily consumed. In connection with the two latter classes, and possibly as a part of each, is the testimony of defendant that he did not know he had killed his wife until told of it some six hours thereafter, and that he did not remember doing it or

anything else done by him for some time previous and subsequent to the killing.

It was proven by the Commonwealth that for some two months or more his wife had not lived with defendant; that she had frequently after the separation complained to the police about his annoyance of and behavior toward her and had him arrested about three weeks before the killing for "beating her up," for which he was fined; that on the afternoon of the killing, which occurred at about seven o'clock in the evening, defendant purchased cartridges for his pistol with which he killed her; that about an hour before the killing he was seen at the L. & N. depot, just across from and in sight of where his wife worked; that at the place of and just before the killing he and his wife were engaged in a conversation; that he shot her several times without apparent cause, went away and returning in a few minutes fired several more shots into her lifeless body; that in about an hour thereafter he returned to the same store where he had in the afternoon purchased ammunition for his pistol and bought more, remarking that he might as well have bought the whole box at the start; that about an hour later he shot but did not kill, Moreland Walker, with whom he had been on friendly terms for some five years, but with whom he had previously had some trivial difficulty; that Walker, after the killing of defendant's wife, had accompanied a police officer in a search for defendant and had left the officer but a few minutes before defendant shot him, without any apparent reason for so doing; that defendant, when found and arrested, at about one o'clock the next morning, was at his home in bed, and when arrested said to the officers arresting him, and in the presence of William Tolle, that he had accomplished what he wanted to do in killing his wife and shooting Walker, and was ready to abide the consequences. It will be noticed this evidence establishes every element of murder, including positive proof of malice preconceived and diabolically executed.

As an absolute defense there was some evidence, properly submitted, and necessitating his acquittal if believed by the jury, that the defendant was insane and therefore wholly irresponsible for the homicide. Thus far there is no trouble, but the Commonwealth contends the killing was either that of a sane person and the crime was murder, or of an insane person and there was no

crime, and these were the only issues triable by the jury, while for the defendant it is contended that the third class of evidence to the effect that defendant was intoxicated, which, accompanied with his statement that he had no purpose to kill his wife, that he did not consciously do it and had consumed nearly a quart of whiskey before doing it, was evidence which, if true, reduced the crime to manslaughter and imposed upon the trial court the duty of giving an instruction upon that lesser degree of the crime charged.

It is the province of the court of course to determine whether or not there is any evidence to support any particular theory of a case. *Helm v. Commonwealth*, 156 Ky. 751, and in so doing to reject as of no probative value a statement of alleged facts inherently impossible and absolutely at variance with well established and universally recognized laws. *L. & N. R. Co. v. Chambers*. 165 Ky. 703.

Of course, we do not know just what was defendant's theory as he did not have to state it, but his statement that he did not know or remember what he had done in connection with evidence of a disposition toward insanity, unquestionably was of some probative value to support a theory of insanity, and was so treated by the trial court. But was such statement in connection with some evidence he was drunk, but still able to go where he wished and do what he wanted to do in many respects, any evidence whatever of a lack of motive in selecting out of all the people in the city of Maysville, the object of his proven, and not denied, ill will? In other words, he may have been insane, on his evidence, and, impelled by an insane and uncontrollable mania, gone about its execution, even with reference to a particular individual and in an apparently sane way, without any responsible motive, but if not insane, could he lay in wait for the person against whom the evidence shows he had ill will pre-existing and independent of any state of intoxication, patiently await for nearly an hour her arrival upon the street and then, after walking with her a short distance, shoot her down without justification of any kind, without having a motive? Is that humanly possible? Is not his statement that he did not know what he was doing (unless he was insane) a statement of alleged facts inherently impossible and absolutely at variance with well established and universally recognized laws of nature? Can a sane man

who, though intoxicated, is still able to go about, transact ordinary business affairs, such as buying ammunition for his pistol, seek out the object of his proven ill will, slay her and then demand of the courts that they shall accord to his statement he didn't know what he was doing when he killed the object of his hatred, and had no motive in doing so, any probative value? If so, then the statement of a drunken man is of more effect than of a sober man. Of course if a sober or drunken man gave a reasonable or even a remotely possible explanation of the alleged shooting such as that he did not do it, or did it in his necessary self-defense, or by accident, or in sudden heat and passion, such a statement under proper instructions would be for the jury to weigh, but a statement from a sober man that he didn't know what he was doing when he killed another, it seems clear, could only be submitted for the jury's consideration, that is, accorded probative value, under the theory he was insane, since under no other hypothesis could it have probative value because inherently impossible and absolutely at variance with every law of psychology and human experience. We therefore conclude defendant's testimony of no consciousness of the killing was given its full and only value in insanity instruction.

2. Drunkenness was at common law no excuse or of any benefit whatever to one accused of homicide, and it is everywhere written in the law of today that it is no excuse for or palliation of crime (13 R. C. L. 715). Yet its use as a defense where motive is an essential ingredient of a crime, is permitted quite generally in a very confused and ununiform way, purely as a result of judicial effort to reduce the harsh rigor of the common law rule to accord more nearly with reason and human experience, and as a consequence upon trial for murder, drunkenness as affecting motive is admitted as a *pro tanto* defense, but as this ameliorated rule has no support except judicial reasoning, it logically must be limited by reason and ought to be applied only as logic supports its application.

Reason and human experience possibly justify the injection of drunkenness to show an absence of motive, under certain circumstances, as where a man kills a friend or a stranger, rationally explainable only as the result either of a presumed malice against mankind, or from a drunken state that suggests no motive at all, but this

certainly is the limit of its reasonable application. Where a man though drunk hunts down and kills, not at random, but his enemy, drunkenness explains nothing not perfectly comprehensible under the ordinary laws of human conduct. The very fact of selection destroys utterly any reasonable deduction of a want of motive or of any motive but malice, and the selection is explained beyond a reasonable doubt by the normal state of mind, not in any sense dependent upon or affected by intoxication; there is left no possible place for any consideration or speculation as to the effect upon the mind of the intoxicant. It did not cause or deter or alter the pre-existent motive; its only possible effect, if any, was upon the nerve or the prudence, and being voluntarily assumed is no excuse for a superabundance of nerve or the lack of prudence. It therefore follows necessarily it can only have weight where there is no other explanation of an act otherwise incomprehensible to human understanding in the light of human experience. Consequently it is the established rule in this state and elsewhere that where one with a proven premeditated determination arms himself and takes intoxicants as a part of his preparation for homicide, his drunkenness is of no weight to explain away the malice. *Marshall v. Commonwealth*, 141 Ky. 222, and equally impotent is the added statement of a sane person of ignorance of having killed an enemy, the only factor present here but absent in the *Marshall* case.

In the case of *Bishop v. Commonwealth*, 109 Ky. 558, relied upon by appellant, the killing of an unknown man was unexplainable upon any other hypothesis than a drunken want of motive or malice against the whole race, and there a manslaughter instruction was warranted if the reason is sound that permits drunkenness in any case to assist in explaining crime, but not so in the case at bar and numbers of cases in which it has been mistakenly permitted to have a part in determining the quality of the crime. Drunkenness is a state of varying degrees and hard to define, and certainly does not have probative value to contradict or overcome even the malice presumed from an unjustified homicide, unless in a degree that negatives any motive, and such a state surely is not reached when the defendant is capable of and makes an accurate selection, in accordance with proven pre-existent malice or ill will.

The cases in this state and elsewhere upon this question are so numerous as to prevent any attempt at a detailed consideration of the facts of each case, which would have to be done to determinewhether on account of drunkenness an instruction upon manslaughter should have been given, so we shall content ourselves with a reference to the fact that the subject has been much confused as a result of a failure to confine manslaughter charges because of drunkenness to such cases only as it afforded reasonable evidence of a lack of motive, and the unwarranted assumption it should be so treated under all circumstances. It is quite generally the rule in states where by statute murder is divided into degrees to permit evidence of drunkenness upon the question of the extent of the malice, as affecting only the question of murder in the first or second degree, malice being of the essence of both degrees, but in such states, it is not allowed to reduce murder to manslaughter, 13 R. C. L. 720; that is, it can not rebut malice but merely explains its degree. That is a much harsher rule than the one we are announcing because we recognize its potency to rebut a mere legal presumption of malice but deny its efficacy to put in issue uncontradicted pre-existent ill will or malice.

An erroneous assumption of some courts and annotators is that where murder is not divided into first and second degrees, evidence of drunkenness is admissible to show want of malice, and *Shannahan v. Commonwealth*, 8 Bush (Ky.) 463, is quite generally cited as so holding, which is not its proper interpretation, as we think we can demonstrate; but such is not the province of such evidence, as is recognized where murder is by statute divided into degrees, which has not been done formally in this state, although such is the practical effect of the two penalties prescribed, life imprisonment or death.

The true province of such evidence, which is admissible as a part of the *res gesta*, is to assist the jury in fixing the punishment in accordance with the extent voluntary drunkenness, considered a human frailty, influenced the perpetration of the malicious crime, at death or life imprisonment, but not to rebut malice and reduce the crime to manslaughter.

In the *Shannahan* case a manslaughter instruction was given and the judgment was affirmed, so the question of whether or not such an instruction was justified was not directly involved on the appeal; however, the opin-

ion shows the defendant while drunk killed his friend without apparent reason or justification, and the court, although not called upon to decide the question, was on the facts justified purely by way of *obiter* in making the very guarded statement with reference to an unobjectionable manslaughter instruction offered by the defendant:

"In the opinion of this court *if drunkenness can be pleaded in excuse for crime or by way of mitigating the punishment on account of crime*, we perceive no valid reason for withholding from the consideration of the jury such an instruction as asked for by the counsel for the appellant in a case like this."

After making this statement, the court proceeds to discuss the wisdom of the relaxation of the common law rule saying:

"By the statute law of Kentucky drunkenness is made an offense for which a penalty may be imposed; and, although drunkenness is in violaton of good morals as well as the law of the land, it may be proper, out of charity to the passions of men and their inability to control in many instances either their passions or appetities, not to adhere to the rigorous rule of the common law, and add to the punishment of a party who by committing a penal offense places himself in such a condition as causes him to commit a still greater offense. But while we sanction this modification of the common law doctrine, we are well satisfied that neither the interests of society nor the wisdom and justice of law requires or authorizes the judicial tribunals of the country to establish the legal principle that the violation of one law, resulting in inflaming and exciting the worst passions of men, shall be deemed a sufficient cause for mitigating the punishment to be inflicted upon those who commit great crimes.

"But, on the contrary, men of violent passions and wicked designs would avail themselves of this very principle of law, by becoming drunk in order to take the lives of their fellow men, with the consciousness on the part of the offender that his drunkenness would be the mitigating feature of his case. The recognition of such a rule of law is but an invitation to men of reckless habits to commit crime; and while their punishment is by incarceration only in the state prison for a few years, the sober man, whose cause for revenge and the desire to take human life therefor is kept within his own breast, for the commission of a like offense is made to suffer death.

There is no reason or philosophy in a law that would hang the sober man for murder, and lessen the punishment of the man intoxicated for the same offense, because the latter had voluntarily placed himself in a condition by which he is induced to take human life. . . .

“The proper rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and that where a provocation is offered, and the one offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober.”

Although this case has been accepted as a leading case supporting the doctrine that evidence of drunkenness necessitates in all cases a manslaughter charge, we confidently assert it not only does not so hold, but is in exact harmony with what we are holding now.

This case, we find, has been cited so many times, we can not undertake an examination of all these cases to see whether or not the rule has ever been enlarged to the extent of reversing a case because of a failure to instruct upon manslaughter under evidence such as we are considering. No such case is cited by appellant, but if so we would not be willing to be bound by it.

Before closing this already too lengthy opinion, we need only call attention to the fact that there was no evidence whatever warranting an instruction based upon involuntary manslaughter, to which counsel for defendant contends he was entitled, and we desire to also call attention to the fact that the jury after hearing all of the evidence offered by defendant as to his being drunk, were not sufficiently impressed therewith to reduce his punishment, to life imprisonment as they were authorized to do, which we have seen was the only consideration to which such evidence was entitled. Hence the court did not err in refusing the manslaughter charge upon the evidence of defendant's intoxication, nor upon his statement of no knowledge, for the latter was given its only reasonable consideration in the insanity charge.

Wherefore the judgment is affirmed, the whole court sitting.

Caudle, et al. v. Luttrell, et al.

(Decided February 7, 1919.)

Appeal from Christian Circuit Court.

1. **Judicial Sales—Collateral Attack.**—A separate action instituted after the term at which a judicial sale of real estate is reported and confirmed, by parties defendants to the action in which the sale was ordered and confirmed, who knew of the sale before confirmation, but did not file exceptions thereto, to set aside the sale and confirmation thereof, is a collateral attack thereof, unless brought under some provision of section 518 of the Civil Code, and can not be maintained unless the judgment of confirmation is absolutely void.
2. **Judicial Sales—Irregularities in—Confirmation—Exceptions.**—Mere irregularities or errors in the advertisement and appraisal do not render the sale or confirmation thereof void, but voidable only, and to be available must be taken advantage of by exceptions filed to the report of the sale.

C. H. BUSH, HUNTER WOOD & SON and JOHN STITES for appellants.

THOMAS P. COOK for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

This is an appeal from a judgment which set aside a judicial sale and confirmation thereof, entered in another suit at a previous term of the Christian circuit court.

In 1911, appellees, F. E. Luttrell and his wife, Sallie Luttrell, purchased of Beasley and Locker, a farm in Christian county, containing about 210 acres, for which they promised to pay \$1,500.00. By agreement with the vendors, they sold off about 27 acres of timber land for \$400.00, and this amount was credited upon the purchase money lien notes, leaving appellees with about 183 acres, with a lien thereon for \$1,100.00. Later B. A. Caudle recovered against F. E. Luttrell, a judgment for \$100.00, with interest and costs, and the execution which issued thereon not having been satisfied, he brought an action to subject F. E. Luttrell's undivided one-half interest in the land for the payment of his debt, subject however to the purchase money lien of Beasley and Locker, who were also made defendants, upon the whole of the land. F. E. Luttrell and Sallie Luttrell, his wife, were served with summons, and by counsel entered a demurrer to the petition, which was overruled, and they did not answer.

Beazley and Locker set up their purchase money lien upon the whole of the land, of which about \$700.00 was still due and unpaid. At a later term of court, no defense having been interposed by Luttrell and wife, a default judgment was entered against them for the unpaid portion of the purchase money due Beasley and Locker, and ordering a sufficiency of the land to be sold to satisfy this judgment, and a sufficiency of F. E. Luttrell's undivided one-half interest in the remainder of the land to be sold to satisfy Caudle's judgment.

Pursuant to this order of sale, the master commissioner of the court sold to appellant, R. A. Lindsay, 107 acres of the land, including all improvements, for the amount of the Beasley and Locker judgment, and F. E. Luttrell's one-half interest in the remaining 76 acres, for the amount of Caudle's judgment. This sale was made on Monday, the 19th day of June, 1915, as directed by the judgment. The master filed a report of his sale, stating therein that prior to the sale he caused it to be advertised as directed by the judgment, and had the land appraised by two disinterested housekeepers of the county, who appraised the whole 183 acres at \$1,600.00, the 107 acres which was sold to satisfy the Beasley and Locker debt amounting to \$719.00, at \$1,070.00, and the remaining 76 acres, one-half of which was sold at \$179.83, to satisfy Caudle's debt, at \$530.00. This report was filed by the master in term time on the 30th day of June, 1915, and passed for exceptions to July 3rd, when, no exceptions having been filed, the sale was confirmed.

R. A. Lindsay, the purchaser of both tracts, thereafter paid his purchase bonds and procured a deed from the master commissioner on the 6th day of November, 1915, after the same had been produced and approved in open court; and at the same time a writ of possession was awarded to him for the 107 acre tract. In December, 1915, Lindsay sold to appellant, C. W. Clark, the 107 acre tract thus purchased by him. On the 26th of May, 1916, appellees, F. E. Luttrell and wife, filed this independent action against Lindsay, Caudle, Beasley and Locker, and later by amended petition against Clark, seeking to set aside the sale and confirmation thereof in the former action, and to cancel the deeds to Lindsay and Clark, alleging that both the sale and confirmation were void because the master had not advertised the sale as directed by the judgment; the appraisers who were se-

lected and attempted to act as such were not qualified as required by law; no appraisement was made after the sale of the separate tracts sold; the land was worth \$3,500.00 rather than \$1,600.00, at which it was valued in the attempted appraisement, and that upon a fair valuation it was sold for less than two-thirds of its value; that neither of the plaintiffs, F. E. Luttrell or his wife, knew of or were present at the sale, but "were told that day that it had been sold," and this was all they knew about it; they admit that the judgment and order of sale were regular and proper and do not seek to disturb either, nor do they offer any explanation or excuse for failing to file exceptions to the sale, although admitting they were parties to the action, and were informed of the sale the day it was made.

On the 26th of June, 1916, lacking just two days of being one year after the sale of the land, appellees tendered to R. A. Lindsay the requisite amount to redeem the land if they had an equity of redemption therein, and this tender was rejected by Lindsay. A demurrer was filed to the petition, but was not acted upon, and issue was joined upon all of the alleged irregularities in the sale.

It is apparent that this action seeking to set aside a judicial sale and confirmation thereof in an independent action, and after the term at which the sale was confirmed, is not within any of the provisions of section 518 of the Civil Code, permitting a modification or vacation of a judgment by the court after the term at which it was rendered, and hence is a collateral attack upon the judgment which confirmed the sale, maintainable only if that judgment is absolutely void, but not if it is simply irregular or erroneous. *Commonwealth v. Harkness's Admr.*, 181 Ky. 709; *Baker, et al. v. Baker, Eccles, &c.*, 162 Ky. 683; *Harrod, et al. v. Harrod, et al.*, 167 Ky. 308.

The master's report shows that the land as a whole and each portion sold, were separately appraised, and that each tract sold brought at the sale more than two-thirds of its appraised valuation; that the sale was advertised by the requisite number of hand bills posted at the court house door and in the vicinity of the land, and by advertisement in three issues of the *Kentucky New Era*, as directed by the judgment; that the appraisers were qualified and appraised the land and each portion thereof sold, as required by law. Upon these questions of fact

raised by the pleadings, the evidence is contradictory, except it is shown conclusively that one of the appraisers was not a housekeeper, as required by law, although a farmer and resident of the county. We think the evidence preponderates that the advertisements were made as directed by the judgment, while upon the issue of whether or not the tracts as sold were thereafter separately appraised as required by law, the evidence is not convincing either way; but all of these alleged irregularities, if established, only render the judgment voidable and not void, and were available to avoid the sale and prevent its confirmation only if presented by exceptions filed to the report thereof, unless an attack is made under some of the provisions of section 518 of the Civil Code, which is not the case here, since appellees in their petition admit they were parties to the action; that the court had jurisdiction of the subject matter and the parties; that they knew of the sale upon the date thereof, and no explanation or excuse is offered for the failure to file exceptions to the report of the sale and have the matter determined in the original action. This rule is so thoroughly established in this jurisdiction by numerous decisions that it seems almost superfluous to make a citation of cases.

In the case of *Costigan, &c. v. Truesdale, &c.*, 26 K. L. Rep. 972, it was said:

"This court has repeatedly held that a mere inadequacy of price is not sufficient to set aside a sale. If it had been a good ground for setting aside the sale the question was raised too late, as the sale had been confirmed months before. Except upon grounds stated in section 518, Civil Code of Practice, the court was without power to set aside the sale after it had been confirmed."

In *Dawson v. Litsey*, 10 Bush 408, this court said:

"The commissioner acts in selling the property as the agent of a judicial officer, and in pursuance of the mandatory clause of the judgment. He is directed to accept bids for the property, to be approved or rejected in the exercise of a legal discretion by the chancellor; and if in the opinion of that officer the commissioner has transcended his authority, his report of sale is rejected, and if not it is confirmed. The order of confirmation is a judicial recognition of the right of the commissioner to make the sale as reported, and is such a final order as may

be appealed from by the party aggrieved. The chancellor alone is to judge of the validity of such sales, and the true test in all such cases is, did the court have jurisdiction of the parties and the subject matter of the action when rendering the judgment; if so, it determines the rights of all the parties to that, so long as it remains unreversed."

And further along in the same case:

"The sale having been made and confirmed by a court of competent jurisdiction, it can not be assailed in a collateral proceeding." See also *Bank of Cerulean Springs v. Gardner*, 134 Ky. 632.

The cases cited and relied upon by appellees, such as *Angel v. Byers*, 153 Ky. 208, are not applicable since they treat of sales under execution by ministerial officers, with reference to which a very different rule applies for a most potent reason, as was explained in the case of *Dawson, &c. v. Litsey*, *supra*, wherein the court said upon this question:

"There is no question but what such a sale made by a sheriff would be a nullity, and pass no title to the purchaser, but there is a well recognized distinction between a sale made by a sheriff, under an ordinary execution, and a sale made by a commissioner, and confirmed by the court, the one being a ministerial and the other a judicial act."

It is therefore apparent that the chancellor was in error in this collateral proceeding, in setting aside the sale and confirmation thereof entered at the previous term in another suit, for an irregularity which if established, did not render the sale void but voidable only, and consequently it was also error to cancel the deeds to Lindsay and Clark.

Wherefore the judgment is reversed and cause remanded with directions to dismiss the petition.

Louisville & Nashville Railroad Company v. Edwards' Administratrix.

(Decided February 18, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Fourth Division).

1. Carriers—Liability for Shipment if Destroyed.—A common carrier who receives freight for immediate shipment is liable for

its value, if destroyed, as an insurer, unless the destruction is (1) through the act of God; (2) the public enemy; (3) the inherent infirmity of the goods.

2. Carriers—Shippers—Destruction of Goods.—Freight delivered to a railroad company to which the shipper has something more to do before the shipment is to go forward, or where the shipper directs the carrier to hold the goods for his further orders, or until he loads other goods, are held by the carrier as a bailee or warehouseman, and the carrier is not liable for the value thereof if destroyed, unless the destruction was brought about through the negligence of the carrier.
3. Carriers—Shippers—Bill of Lading.—A bill of lading is not necessary in order to charge the carrier with an acceptance of the goods for immediate shipment, if the carrier in fact did so accept the goods; and a bill of lading issued by the carrier before it receives the goods does not ipso facto render the carrier responsible.
4. Carriers—Acceptance of Shipment.—An acceptance of the shipment by the carrier will be presumed where the carrier provides a car into which the goods are to be loaded by the shipper, and when the goods have been loaded the agent of the carrier closes and seals the doors of the car, and promises to deliver a bill of lading to the shipper on the next morning.
5. Appeal and Error—Harmless Error.—A judgment will not be reversed for harmless error in an instruction when the instruction as a whole is not misleading.
6. Trial—Instructions.—An offered instruction is properly refused where there is no evidence to support it.

B. D. WARFIELD and MOORMAN & WOODWARD for appellant.

A. B. BENSINGER and J. P. HOBSON & SON for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

By this action, commenced in the Jefferson circuit court, Edwards sought to recover of the Louisville & Nashville Railroad Company the value of a car load of merchandise, consigned by him at Highland Park to himself at New Haven, Kentucky, and which goods were destroyed by fire after the same had been loaded into a box car provided by the railroad company for the transportation of the consignment. The value of the goods was alleged to be \$6,138.14. Edwards asserts that the car was fully loaded and placed in the possession of the railroad company as a common carrier, for immediate shipment on Monday evening, April 5, 1915, about 6:30 o'clock, and that the agent of the company then and there received and accepted the car for immediate shipment; while the appellant company says the car was only partly

loaded on Monday evening, and that Edwards either directly or tacitly indicated that he would finish loading the car on Tuesday morning, and therefore the car was not in its possession as a common carrier for immediate shipment, but only as a bailee or warehouseman. The fire was of unknown origin, and destroyed the goods about 11 o'clock p. m. on the night after Edwards says he had completed the loading of the car.

A trial resulted in a verdict and judgment in favor of Edwards for \$6,138.14, and the railroad company appeals.

If the goods were in the possession of the railroad company, as a common carrier, for immediate shipment at the time of the fire, the company is liable as an insurer of the goods; but if there remained something to be done to the goods or car by Edwards before the same was ready for shipment, then the company's liability would be such only as attaches to a bailee or warehouseman for negligence. As there is no charge of negligence Edwards' cause fails, unless the car of merchandise was in the possession of the railroad company as a common carrier.

The general rule is that a common carrier is liable to the shipper as an insurer, for the value of the goods, if the goods have been actually or constructively delivered to the shipper and actually or constructively accepted by it for immediate shipment. The common law liability of a carrier, as an insurer of freight, does not attach until the freight has been delivered to it, either actually or constructively for immediate carriage. If the goods are delivered to the carrier to be held until the shipper directs the carrier to forward the goods, or until the shipper does some act with respect to the goods or the shipment, the carrier is not liable as an insurer, but only for negligence which contributes to the injury or destruction of the goods. A bill of lading is not necessary to show delivery of the goods to the carrier or its acceptance of the shipment, and an acceptance by the carrier may be complete without a bill of lading having been issued for the shipment. On the contrary, a bill of lading issued by a carrier before the goods are delivered to it, does not render the company liable. The general rule is thus stated in 4 R. C. L., section 172: "Where goods are placed for shipment in a car which is left standing on a side track by a carrier for that purpose, and the railroad

company is notified of such loading, a constructive delivery to the latter takes place, *eo instanti*, without any further act on the part of the shipper being necessary. The reason given for this rule is that so long as a car remains on a railroad company's road, or side track, it is under its control and necessarily in its possession, at least to the extent that the company, at any moment, after the car is loaded, has the unquestioned right to move it to any other part of its road, whereas, a shipper has no such right, even if he possessed the means, but has simply the right to load the goods on the car." The same author, in section 173, says: "As a general proposition it may be stated that the signing of a bill of lading or the issuance of any written shipping contract is not essential to the complete delivery of a shipment of freight to a railroad company. In other words, if a shipment has passed entirely out of the control of the owner so far as anything remains for him to do before transportation can begin, and has come within the unconditional control and direction of the railroad, the question of actual delivery is not dependent on the issuing of a bill of lading. Particularly true is this principle where there has been an actual physical surrender of the property, as where goods properly marked for shipment have been definitely accepted by the agents of a railroad company with a view to immediate shipment, or have, with the knowledge of the agent, been placed in the carrier's freight depot for immediate shipment. In such a case whether there is an express or implied acceptance of property, it is not necessary that it should be entered on a waybill or freight bill, or any written memorandum made in order to make the company liable for it to the same extent as after it is put on a freight train." The same writer, in a further discussion of the subject, says that a bill of lading is wholly unnecessary to the complete delivery and acceptance of the goods for immediate shipment, and that such an instrument is merely evidence that the carrier has received possession of the property, but this fact may be shown by any other legitimate evidence, in the absence of a bill of lading or receipt.

Edwards applied to the railroad company's agent, at Highland Park, for a box car in which to load and ship a quantity of merchandise to New Haven, Kentucky, and asked if he could have a special freight rate. A few days later he was informed by the agent he could have the car

and that it would be placed on the siding near his store and the depot at Highland Park for the purpose of transporting his goods to New Haven, but that the usual freight rate would be charged. Shortly after that, on Friday evening, the car was placed, and Edwards began to load his merchandise, which was packed in boxes, into the railroad car. Six o'clock was the regular closing hour for the station agent, and the car, being only partly loaded at that hour, was closed and the doors sealed by the agent; next day, Saturday, Edwards loaded other goods into the car, but being unable to complete the loading, the car was again closed and sealed by the agent Saturday evening. On Monday following, Edwards finished, as he says, loading the goods into the car about 6:30 p. m. and informed the agent of the fact that the goods were loaded and that the car was ready for shipment. The agent, according to Edwards, then closed the doors of the car and sealed them, and as it was then after closing time, told Edwards he would give him a bill of lading for the shipment next morning. The goods were destroyed that night. No bill of lading was issued by the company to Edwards, but on Monday evening, according to Edwards, the agent gave Edwards an itemized statement of the goods loaded into the car. The agent says that Edwards had not finished loading the car on Monday evening; that he indicated his desire on Monday evening to load other goods into the car Tuesday morning, and that he did not issue a bill of lading for that reason. There is a sharp conflict in the evidence. If the agent is right, then the railroad company was not responsible for the loss of the goods, because it had not received them as a carrier for immediate shipment, but if Edwards is correct in his statement of the facts, then the company is liable. The railroad company contends that if Edwards' version of what took place on Monday evening at the time the car was closed, be conceded, there was no acceptance by the shipper of the consignment, and, therefore, no liability. It is a well established rule that a carrier is not liable as an insurer for goods which it has not accepted, either actually or constructively, for immediate shipment. But we are unable to see what more the company could have done in the case at bar to have effectuated an acceptance than was actually done. Edwards asked for the car to transport his goods; the car was provided at a convenient place, and within twenty

feet of the depot of appellant; the agent of the company had charge of the car and closed it each evening. Shipping directions had been given him by Edwards; Edwards told the agent on Monday evening that the car was loaded and ready for shipment. The agent then closed the doors and sealed them and promised to deliver to Edwards the next morning a bill of lading for the car. Nothing remained for Edwards to do before the shipment should go forward. It was then placed in the hands of the company as a common carrier for immediate shipment, and was under its absolute control. There was no routing to do, because the appellant company had but one line from Highland Park to New Haven. By agreement the freight charges were to be paid at the destination. We think the facts, as stated by Edwards, fairly show an actual acceptance by the railroad company of the shipment. In the case of *Pittsburg C. C. & St. L. Ry. Co. v. American Tobacco Co.*, 126 Ky. 588, this court held: "But the acceptance need not always be shown to have been by an expressed act. It may be presumed, when the goods are left in the usual place in accordance with the contract or custom of the carrier to so receive them. *Hale on Carriers*, 68." The cases relied on by appellant, while bearing many of the features of the one in hand, show that control over the goods had not been parted with by the shipper, or that something else was to be done by the carrier before the shipment was to begin, such as counting or weighing the goods. But, when goods are designed for immediate shipment, the placing them in a condition to be carried at the usual place of loading, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, constitutes a delivery to the carrier and acceptance by it. *Railroad Co. v. Flanagan*, 113 Ind. 488; *Railroad Co. v. Murphy*, 60 Ark. 333; *Dunnigton v. Louisville & Nashville R. R. Co.*, 153 Ky. 388; *Nelson v. C. N. O. & T. P. Ry. Co.*, 157 Ky. 259; *L. H. & St. L. Ry. Co. v. Southern Seating Co.*, 157 Ky. 772; *C. N. O. & T. P. Ry. Co. v. Williams*, 156 Ky. 114; *C. N. O. & T. P. Ry. Co. v. Rankin*, 153 Ky. 730; *Bland v. Adams Express Co.*, 1 Duvall 233; *Farley v. Lavary*, 107 Ky. 523; *Robertson v. Kennedy*, 2 Dana 431; *Hall v. Renfro*, 3 Met. 54; *Gaddis & Stiles v. L. & N. R. R. Co.*, 129 Ky. 175; *Lewis v. L. & N.*, 135 Ky. 361; *C. & O. Ry. Co. v. Hall*, 136 Ky. 379; *Southern Railway Co. v. Smith*, 102 S. W. 232, 31 R. 243.

Appellant company urges a reversal because a peremptory instruction was not given the jury on its motion, and this is based upon the contentions, (a) that the car was never delivered to the company for immediate shipment; (b) the agent was without authority to accept a shipment after six o'clock p. m., the usual time for closing the station; (c) the agent refused to accept the shipment when he refused to issue a bill of lading. While we have considered these contentions, we might say with reference to the acceptance and the issual of the bill of lading that Edwards' evidence shows that he asked for a bill of lading and the agent of the company said he desired to catch a street car to town to get his supper, and asked the indulgence of Edwards until the next morning to issue the bill. Time to issue the bill was given at the suggestion of the agent and for his accommodation. As said in 10 Corpus Juris, sec. 313: "The liability of a carrier as a common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading; the issuance of a bill of lading is not necessary to complete delivery and acceptance." 4 Ruling Case Law, section 173.

The question of fact was submitted to the jury by the following instructions:

"1. If the jury believe from the evidence that on the afternoon or evening of Monday, April 5, 1915, before or at the time the car of the defendant referred to in the evidence was sealed by Earl Mock, the agent of the defendant at Highland Park, the plaintiff, J. T. Edwards, told or informed the said agent Mock that the loading of said car was completed or that said car was ready, then in that event the law is for the plaintiff and the jury should so find, notwithstanding the fact admitted by the evidence that no bill of lading was issued by the defendant to the plaintiff for the shipment of said goods or property.

"2. But, unless the jury believe from the evidence that on the afternoon or evening of Monday, April 5, 1915, before or at the time the said car of defendant referred to in the evidence was sealed by Earl Mock, the agent of the defendant at Highland Park, the plaintiff, J. T. Edwards, told or informed said agent Mock that the loading of said car was completed or that said car was ready, then the law is for the defendant. Or if the jury believe from the evidence that on the afternoon

or evening of April 5, 1915, before or at the time said car was sealed by the defendant's agent, Mock, the plaintiff said or informed said agent Mock that he, the plaintiff, had some more goods to go into the said car on the following morning, then in that event the law is for the defendant and the jury should so find."

Appellant insists that the second sentence in instruction No. 2 erroneously placed the burden upon the company to show that Edwards had more goods to go into the said car on the following morning, and that this part of the instruction is in conflict with the first part of the same instruction. The instruction in this particular could have been more aptly drafted, but the second sentence seems to be only an explanation of the first part of that instruction. It would be difficult to conceive of a jury being misled by an instruction which tells them unless you believe from the evidence at the time the said car of defendant, referred to in the evidence, was sealed by the agent of the company, the plaintiff Edwards told or informed said agent that the loading of said car was complete, or that said car was ready, then the law is for the defendant. This is but the converse of the first instruction. It would have been better had the court omitted the second sentence of instruction No. 2. But when the whole instruction is read together, it presents only the converse of instruction No. 1, and is not prejudicial to the rights of appellant, although it is erroneous. Instruction No. 1, offered by appellant, has no place in the law of this case as there was no evidence to support it. The only issue of fact was presented to the jury by the instructions given by the court: Was the car delivered to and accepted by the company as a carrier for immediate shipment? There was no evidence whatever to support appellant's offered instruction on the inherent infirmity of the goods. When the car was discovered on fire, the seal was broken and the west door was opened. Several hoboos were loitering around the depot premises that night. No doubt the fire was started in order to cover a theft.

Appellant complains of the action of the trial court in striking paragraphs Nos. 2 and 3 of its answer. By the second paragraph of its answer, appellant avers that it was not guilty of negligence with respect to the consignment of goods in question; that its agents did not ignite or cause to be ignited the goods of appellee; that it

exercised the highest degree of care, required of it under the law, with respect to said shipments. As appellee did not rely upon the negligence of appellant company, this plea was wholly irrelevant and was properly stricken out. All that is alleged by the second paragraph of the answer may be admitted without prejudice to appellee's right to recover. For similar reasons the third paragraph of the answer was properly stricken by the trial court.

There appearing no error to the prejudice of the substantial rights of appellant, the judgment is affirmed.

Taylor, et al. v. Asher, et al.

(Decided February 21, 1919.)

Appeal from Leslie Circuit Court.

1. Judgment — Collateral Attack — Jurisdiction. — A judgment rendered in a court of general jurisdiction cannot be collaterally attacked unless the want of jurisdiction affirmatively appears in the record.
2. Judgment—Collateral Attack.—Where the record shows that infants under 14 years of age were summoned by service upon their custodian, which was in accordance with section 52 of the Civil Code, if the father was dead or a non-resident of the state, and it does not appear from the record that he was alive and a resident of the state, the judgment is not void and cannot be collaterally attacked.

LEWIS & LEWIS for appellants.

CLEON K. CALVERT for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

In 1887 Mrs. Elizabeth Wilson, who was a daughter of John and Jane Hall, died leaving surviving her, her husband, Charles Wilson, and three infant children, Polle, Jennette and Jane Wilson. Shortly after her death, her mother and father executed to her three infant children a title bond for about 100 acres of land, located on lower Bad creek, in Leslie county, in consideration for which their father, Charles Wilson, gave to John Hall and his wife, the care, custody and control of his three children during infancy, and surrendered to John Hall a title bond he had for the same land and some personal property. The title bond to the infant children and the written contract between their father and grandparents were re-

corded in the office of the clerk of the Leslie county court, although the contract was not a recordable instrument. The three infant children thereafter made their homes with and were subject to the control of their grandparents, John Hall and Jane Hall, until 1893, when John Hall died intestate, the owner of a large body of land, but considerably in debt. Shortly thereafter William Hall was appointed as administrator, and on the 20th of June, 1894, instituted in the Leslie circuit court a suit to settle his estate, and to that suit numerous creditors and all of the heirs of John Hall, including the Wilson children, then infants under fourteen years of age, were made defendants, and the land for which John Hall and his wife had executed title bond to the Wilson children, was therein adjudged to be his land, and was sold to pay his debts, to Robert Asher, a son-in-law of John Hall, and Asher having died after the sale had been confirmed, but before a deed was made to him for the land, the deed therefor was by order of the court made by the master to Asher's widow and children, on the 6th day of April, 1898.

In this action, filed early in 1910, the three Wilson children sought to compel the widow and heirs of Robert Asher to specifically perform the title bond executed to them in 1887 by John Hall and his wife; to this petition the defendants, among other defenses, pleaded the judgment in the suit of John Hall's administrator against his heirs and creditors, as a bar. Upon a trial the chancellor dismissed the petition, from which judgment plaintiffs have prosecuted this appeal. The only question involved upon the appeal, is whether the judgment in the suit of John Hall's administrator against his heirs and creditors is void, because counsel for appellants concede that this is a collateral attack upon that judgment, and is maintainable only if that judgment is void.

To ascertain whether or not that judgment is void, we must look alone to the record in that case, since the rule is thoroughly established in this jurisdiction and elsewhere that a domestic judgment rendered in a court of general jurisdiction cannot be collaterally attacked, unless the want of jurisdiction affirmatively appears in the record. *Maysville & Big Sandy R. R. Co. v. Ball*, 108 Ky. 275; *Segal v. Reichert*, 128 Ky. 117; *Dennis v. Alves*, 132 Ky. 345; *Bamberger v. Green*, 146 Ky. 259; *Harrod v. Harrod*, 167 Ky. 315; *Ratliffe v. Childers*, 178 Ky. 102;

Bentley v. Stewart, 180 Ky. 23; Fraize v. Walls, 180 Ky. 168; Freeman on Judgments, sec. 124; Black on Judgments, sec. 273.

The old record shows that each of plaintiffs was made a party defendant and summons issued against them, which was returned by the sheriff with the following endorsement thereon:

"Executed on Jane Hall, P. J. Hall, Robert Asher and Polly Asher by delivery to each of them a true copy of this summons and on Polly Wilson, Jennette Wilson and Jane Wilson by delivering a true copy of this summons to Jane Hall, their grandma, with whom they reside, they each being under fourteen years old. This August 1, 1894, G. H. Steele, shrrff. Leslie Co."

The verified petition in that action contains the statement:

"That the defendants, Polly Wilson, Jennette Wilson and Jane Wilson, are infants of tender years under fourteen years and reside with and are under the control of Jane Hall, the defendant herein, and that said infants have no curator, committee nor guardian in this state or elsewhere known to the plaintiff, and he asks that a guardian *ad litem* be appointed for said infant children to defend for them."

The old record does not contain an order appointing a guardian *ad litem* for these infants, but at the following November term of the court, after the return of the summons with the above endorsement thereon, an answer was filed by a guardian *ad litem* for Polly, Jane and Jennette Wilson, in which it is recited that the guardian *ad litem* who filed the answer, had been appointed as such "at the present November term of this court."

It is insisted, however, by counsel for appellants that the judgment in the old case is void because (1) delivering a copy of summons to Jane Hall, the grandmother and custodian of the defendants, then under fourteen years of age, was not a valid service upon them as required by section 52 of the Code, since at that time, Charles Wilson, their father, was alive and a resident of Knox county, Kentucky, and (2) because the appointment and answer of the guardian *ad litem* were void and of no effect, because the infant defendants for whom he attempted to answer, had not been served with process before his appointment, as required by section 38 of the Civil Code.

It will therefore be seen that the sole ground for both these conclusions is the contention that the service of summons upon the custodian was illegal, and the court never acquired jurisdiction of appellants.

The first obstacle, an unsurmountable one, met by appellants in the attempt to sustain this contention upon a collateral attack is that it appears nowhere in the old record that Charles Wilson, the father of the infants, was alive and a resident of this state, at the time the summonses were served upon their grandmother and custodian, and this fundamental fact by which they seek to show that the service was illegal, does not affirmatively appear in the old record, and there is nothing therein to show that the services upon the custodian were not in strict accordance with the provisions of section 52 of the Code, which provides that if a defendant is under fourteen years of age, summons must be served on his father, or if he have no father, on his guardian, or if he have no guardian, on his mother, or if he have no mother, upon the person having charge of him. So even if we might admit that the service of the summons upon the custodian was not in accordance with the requirements of section 52 of the Code, a doubtful question under the peculiar conditions disclosed by the evidence in this action, that fact does not appear affirmatively or at all in the old record, and therefore under the authorities cited above is insufficient to render the judgment void.

It is therefore apparent that from a consideration of the old record to which we are confined, it does not affirmatively appear that appellants were not legally summoned, or that the guardian *ad litem* was not validly authorized to make defense for them, hence the judgment attacked, if erroneous, was not void, and the chancellor did not err in dismissing appellants' petition collaterally attacking it.

Wherefore, the judgment is affirmed.

Smith v. Ruth, et al.

(Decided March 11, 1919.)

Appeal from Owen Circuit Court.

1. Attachment—Discharge of Attachment—Formal Order Granting.
—Where in an action brought upon an unmatured note, the plain-

tiff was granted an order of attachment by the clerk of the court in which the action was pending as authorized by the Civil Code of Practice, sections 237-8, and the attachment issued by the clerk was duly levied by the sheriff upon a tract of land belonging to one of the defendants, the court was without authority to discharge the attachment on the face of the papers, because of the failure of the clerk to enter, before issuing it, a formal order granting the attachment and directing its issuance by himself.

2. Attachment—Order Granting.—Under section 238, Civil Code, authorizing the clerk to "grant" an attachment in actions for debts not due, that officer may issue the attachment without making a separate order granting the attachment or directing himself to issue the writ.

W. A. LEE for appellant.

TOMLIN & VEST for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This action was brought Nov. 21, 1916, in the court below by the appellant, T. D. Smith, to recover of the appellees, L. B. Ruth and T. J. Ruth, a debt of \$348.00, evidenced by a joint and several note for that amount executed by them and W. J. Ruth July 5, 1916, due six months after date and bearing interest from maturity until paid. It will be observed that the note had not matured when the action was instituted.

The petition alleges that W. J. Ruth is a non-resident of this state and absent therefrom and that he has no property in this state; that both he and T. J. Ruth are insolvent, and that the latter had made an assignment for the benefit of his creditors without retaining in his possession any property subject to execution; that L. B. Ruth had sold, conveyed or otherwise disposed of his property and suffered it to be sold, with a fraudulent intent to cheat, hinder and delay his creditors, including the appellant; also that he is about to sell, convey and otherwise dispose of his property or permit it to be sold, conveyed, or disposed of with such fraudulent intent and would succeed in so doing unless prevented by the court. An order of attachment against the property of the appellees, L. B. Ruth and T. J. Ruth, was prayed. The petition was properly verified by the oath of the plaintiff. As the note sued on had not then matured, the attachment had to be obtained as authorized by the Civil Code, section 237, subsection 2, and section 238, subsection

2, the latter allowing it to be granted by an order from the judge or clerk of the court in which the action is pending, on the grounds mentioned in subsections 2, 3, 4, 5, 6, 7 and 8 of section 194, Civil Code, the grounds contained in subsections 7 and 8 being those relied on by the appellant. The order of attachment was granted and attachment issued by the clerk of the Owen circuit court and the attachment duly levied by the sheriff upon a 174 acre tract of land as the property of the appellee, L. B. Ruth. The land lies in Owen county and is fully described in the sheriff's return showing the levy of the attachment. The attachment was not issued until appellant had executed the required bond.

At the appearance term of the Owen circuit court, held in March, 1917, the appellant filed an amended petition in which it was alleged that the note sued on had matured following the institution of the action and was then due. During the same term the appellee, L. B. Ruth, who had been served with both the summons and attachment, appeared in court and entered a motion to discharge the attachment on the face of the papers. The motion was sustained and attachment discharged by the court, to which the appellant excepted. After the entering of this order and at the same term, the court rendered a personal judgment in favor of appellant against the appellee, L. B. Ruth, for \$348.00, the amount of the note, with interest thereon at the rate of six per cent per annum from January 5, 1917, until paid and his costs expended; dismissed the action as to certain garnishees and continued it as to W. J. and T. J. Ruth, directing the issuance of an alias summons to Fayette county against the latter.

None of the defendants by answer, or otherwise, resisted the appellant's right to recover upon the note, and the only resistance of the attachment was presented by the motion of L. B. Ruth to discharge it on the face of the papers. Notwithstanding the previous discharge of the attachment, the grounds therefor, being uncontroverted, were sustained by the judgment. Following the service upon the appellee, T. J. Ruth, of the alias summons, the court, at the succeeding term, held in June, 1917, gave appellant a personal judgment against him for the amount of the note, interest and costs; and, on appellant's motion, dismissed the action as to the non-resident defendant, W. J. Ruth, without prejudice.

Although the judgment does not set forth the reasons that actuated the circuit court to sustain the appellee L. B. Ruth's motion to discharge the attachment on the face of the papers, we are advised by the briefs of counsel that it was done upon authority furnished by the opinion in the case of *Glaser v. Frank*, 16 R. 25, decided by the superior court, then in existence, in which it seems to have been held that under section 238, Civil Code, which gives the clerk as well as the judge of the court in which is pending the action for debt, not due, the power to grant an attachment, the clerk has no power to issue the attachment, until he has first made a formal order granting it; that is, he must first grant the attachment and order himself to issue it. It does not appear that an appeal was taken from the judgment of the superior court in that case to the Court of Appeals, but it is nevertheless true that the latter court has expressly disapproved of the rule of practice in question announced by the superior court in the case, *supra*.

This was done in the case of *Ouerbacker, Gilmore & Co. v. Claflin & Co.*, 96 Ky. 235.

In disposing of the question the court in part said: "There is no more reason, when the language of the section is considered, for the contention that in actions brought pursuant to sections 237-8, the clerk should make an independent order granting the attachment, than that he should do so when the action is brought under section 196, and certainly if the language of the section does not require it, we can conceive of no reason why the clerk shall make an order to himself, directing himself to do that which the statute empowers him to do in plain terms. Under the conditions named in section 238, the clerk 'may grant an attachment against the property of the defendant.' Under section 196, under certain conditions, an 'order of attachment shall be made by the clerk.' In both classes of cases, the writ issued by the clerk is the 'order of attachment,' and is so designated in the sections of the code applying to actions for debt due and not due. Before the amendment of April, 1888, the clerk was without the power to make the order of attachment until permitted to do so by the order of another officer. There is now no reason conceivable why he may not make such order, as permission from another officer is no longer required. Such a construction would be purely technical, is not demanded by the letter or spirit of the law, and cer-

tainly there is no intelligent reason for requiring the clerk to direct an order to himself."

The opinion in *Ouerbacker, Gilmore & Co. v. Clafin & Co.*, *supra*, is conclusive of the question at issue and must therefore control its decision. Indeed, in our opinion any other view of the matter would be illogical and superlatively technical.

There is no merit in appellee's contention that appellant is concluded by the order of the circuit court discharging the attachment on the face of the papers, because of his failure to apply to a judge of the Court of Appeals for the reinstatement of the attachment. He might have resorted to that remedy, but was not compelled to do so; and if he had done so and been refused the reinstatement of the attachment, the order of such judge being merely interlocutory in effect, would not have prevented him from obtaining of this court, on appeal, a review of the final judgment of the circuit court disposing of the attachment. On the other hand, if the order of the judge of the Court of Appeals had reinstated the attachment, the appellees, on appeal, could have obtained of this court a review of the final judgment of the circuit court entered in conformity to the interlocutory order of the judge of the appellate court.

In *Cabell, Basye & Co. v. Patterson*, 98 Ky. 520, we held that though an order or motion to discharge an attachment is not a final order, it may, after a final judgment in the action, be reviewed in this court. (*Talbot v. Pierce*, 14 B. Mon. 200, 158.) In the opinion it is said:

"In this case there was no necessity for the plaintiff to apply to a judge of this court to have the attachment reinstated, because the order discharging the attachment filed appellant's amendment and reinstated the attachment. Even if this had not been done, this court could have, after final judgment, reviewed the action of the court in discharging the attachment, although it had not been reinstated by a judge of this or the superior court.

"Suppose the lower court should make an order discharging an attachment before final order, and a judge of this court should refuse to reinstate it, could it be contended that plaintiff had lost his lien upon the property attached when he had fully complied with the provisions of the code alleging grounds for the attachment? Could it be said that he was remediless under such a state of case? In such case this court, after final judgment, could

review the action of the court discharging the attachment."

It follows from what has been said that the action of the circuit court in discharging the attachment on the face of the papers, was error; and as there has been no trial of the attachment and the case must be remanded to that court for a final disposition of the attachment and lien claimed by appellant on the land of L. B. Ruth upon which it was levied, the latter, upon the return of the case, should be permitted, if he so desires, to controvert the grounds of attachment before it is tried.

For the reasons indicated, the judgment is reversed and cause remanded to the circuit court, with directions to set aside the order discharging the attachment on the face of the papers, and for a trial of the attachment in conformity to the opinion.

Louisville & Nashville Railroad Company v. McIntosh.

(Decided March 11, 1919.)

Appeal from Breathitt Circuit Court.

1. Master and Servant—Negligence—Liability.—The master is not an insurer of the safety of the servant, but, is liable, only, for injuries suffered by the servant by reason of the master's negligence.
2. Master and Servant—Assumption of Risk.—The servant assumes all the ordinary risks, incident to the work, in which he is engaged.
3. Negligence—Contributory Negligence—Pleading—Submission to Jury.—A plea of contributory negligence is an affirmative one and if not denied, the plaintiff, against whom it is charged, has no cause for submission to a jury.

O. H. POLLARD and BENJAMIN D. WARFIELD for appellant.

COPE & COPE for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

This action was instituted by the appellee, George McIntosh, against the appellant, Louisville & Nashville Railroad Company, to recover damages of it, suffered by the appellee, while a servant of the appellant, and caused from a fall, received by him, upon the track of the railroad.

The petition, in substance, stated, that appellee, while a section laborer upon appellant's line of railroad, and after it had become dark upon a certain evening, was directed, by the foreman of his section gang, to go, very hurriedly, in a run, around a certain curve, and to signal an oncoming train, to stop, so as to prevent any accident to it, by its running upon an unsafe place, in its tracks, and while attempting to reach the place to which he was directed to go to signal the train, and without any fault or negligence upon his part, he fell and severely injured his face, and other designated portions of his body, to his damage in the sum of \$1,500.00. The appellant demurred generally to the petition, and without waiving the demurrer, answered, traversing the averments of the petition, and in addition, plead, that appellee's negligence contributed to his injury, to the extent, that but, for his own negligence, he would not have suffered any injury. The appellee did not deny the contributory negligence, by a reply, nor otherwise.

Upon a trial, before a jury, the appellee stated, that he had been engaged in working as a laborer, upon a certain section of the road, under the directions of a foreman, for about eighteen months, and upon a night, about seven o'clock, and after it had become dark, he and several others of the section men were called out, by their foreman, for the purpose of repairing a low place, in the track. They were proceeding along the track upon a hand car, when an engine was heard to blow, and it was thought to be a train approaching from the direction, in which the hand car was going. There was a curve, in the track, just in front of the hand car, and the foreman directed him to take the lanterns, a white one and a red one, and to run around the curve to a point, from which he could signal the oncoming train, and prevent it from coming forward and colliding with the hand car, and that the foreman cursed him, when giving this direction. He was running forward, with the lanterns in one hand, and when he had gone forward, along the track, for about three hundred yards, he came to a place, where the cross-ties had been raised so as to rest upon the top of the bal-last. From his testimony, the cause of his falling is not clear, but, the best, that can be made of it, he stepped upon a cross-tie, a portion upon one side of which was decayed, and the decayed portion broke off, and slipped away, and caused him to lose his balance and to fall. He fell upon his face, which received a cut, and his side, as

well as one leg, were hurt by the fall. The lantern, which made a white light, and which he was carrying, was the usual lantern used by the servants of the railroad, to enable them to see, at night, and the red one, was for the purpose of signalling. It was a part of his duties, to flag trains, and to give signals, to protect the hand car when going around curves, and had, frequently, done so, theretofore. He was acquainted with the fact, that the cross-ties, at the point, where he was injured, were lying upon the ballast, as he had assisted in placing them, in that position. Other witnesses, for appellee, made statements similar to those of appellee, except the other witnesses, said, that the direction of the foreman, to run ahead, and signal the train, was addressed to all of them, and the appellee seized the lanterns and went off, in a trot, and they fail to corroborate the statement of appellee, that the foreman cursed him, when giving the direction.

At the close of the testimony for appellee, the appellant moved the court to direct a verdict for it, but, the motion was overruled.

The appellee, then offered an instruction to the jury, to which the appellant objected, but his objection was overruled, and the instruction was given, and appellant saved an exception. The instruction, in substance, directed the jury, that it was the duty of the section foreman to warn the appellee and other men working under him of danger, and if it believed from the evidence, that appellee, while in the employment of the appellant and under the direction of its foreman, and without negligence upon his part, and while attempting to flag down one of appellant's trains, was injured, it should find for him.

The jury returned a verdict for damages for appellee, and the court rendered a judgment against appellant in accordance with the verdict, and overruled the motion for a new trial, and the railroad company has appealed.

It will be observed, that the petition did not state a cause of action. Negligence of the appellant is not alleged, nor charged, as being the cause of the injuries suffered by appellee, either directly, or remotely, nor is appellant charged with any negligence. The profane language alleged to have been used by the foreman, in directing the appellee, could not have been the cause of his falling upon the ground, from which, he avers, his injuries arose, nor is his fall attributed to that cause. The peti-

tion fails to charge, that the appellee's falling upon the ground, was caused by any obstruction upon the track. The sending of appellee, in the night time, in a hurry to signal a train, is not alleged to have been negligently done, nor is it claimed, that so doing constituted negligence, nor is it charged, that attempting to perform the service, at the time, or in the manner directed, caused the fall. To permit a recovery under the averments of the petition, it would be necessary to hold, that an employer is an insurer of the employe against any personal injury, which he may suffer, while engaged in the service of the employer. That an employer is not an insurer of the safety of the employe, is one of the firmly established doctrines of the law, with relation to the rights of employers and employes. The master is liable in damages to an employe for only such injuries as are attributable to the negligence of the former, in the performance of duties, which he owes to the servant. 26 Cyc. 1077, 18 R. C. L. 544.

The plea of contributory negligence, not having been controverted, it was admitted, upon the trial by the appellee, that his injuries were caused by his own negligence, and that except for his own negligence, the injuries would not have been sustained. The defense of contributory negligence, is an affirmative one, and when the truth of it is admitted by a failure of the plaintiff to controvert it, he has no case to submit to the jury. *L. & N. R. R. Co. v. Paynter's Admr.*, 82 S. W. 412; *Brooks v. L. & N. R. R. Co.*, 71 S. W. 507; *Mast v. Lehman*, 100 Ky. 464; *Louisville Ry. Co. v. Hibbitt*, 139 Ky. 43. Hence, the motion for a directed verdict in favor of the railroad company should have been sustained.

The evidence, offered by appellee, failed to prove or conduce to prove, a cause of action, in his behalf. It is a principle applied generally to the rights, duties and liabilities of employers and employes, that the employe when engaging in an employment, assumes all the ordinary risks, which are incident to the employment. In other words, the assumption of such risk, grows up out of the contract of employment. *Burton Construction v. Metcalf*, 162 Ky. 366; *Washists & B. M. A. Co. v. Hall*, 167 Ky. 819; *L. H. & St. L. N. R. R. Co. v. Henry*, 167 Ky. 151; *Phillips v. Carter & Farris*, 166 Ky. 538; *Gordon v. C. & O. Ry. Co.*, 166 Ky. 339; *Isaacs v. L. & N. R. R. Co.*, 167 Ky. 256; *Ohio Valley Co. v. McKinly*, 16 R. 445;

Fort Hill Stone Co. v. Owen, 84 Ky. 183; DeLozier v. Ky. Lumber Co., 13 R. 818. Furthermore, it is the duty of section hands, to observe and keep the track of a railroad free from obstruction.

The evidence shows, that it was a customary duty of the men, upon the section, with appellee, to signal trains, and to go ahead around curves, to give signals to protect trains, from colliding with hand cars, and to protect the hand cars from such collisions, and to give signals, wherever they were directed, at tunnels, bridges and other places, where such duties were necessary, and appellee had been frequently assigned to, and performed such duties. The nature of the work of keeping a track in repair, so as to not hamper and impede commerce and public travel, and prevent their exposure to dangers, reasonably makes necessary, the movements of section hands, with hand cars, oftentimes at night, as well as by day, and thus the necessity of signal duties arises, at night, as well as by day. In so doing, as well as performing various other duties, it is necessary for the section hands to walk along the tracks of the road, and in cases of supposed emergency, as in the instant case, to move very hurriedly. It is not practical for a railroad company to maintain tracks of such smoothness, and dryness, as to remove all probability of a section hand stumping his toe and falling, or of his foot from slipping, and thereby, causing him to fall, or his being caused to fall from any other ordinary condition of the track. The cross-ties are usually made of wood, and all men know, that after a time, the wood becomes decayed upon the sides, without rendering them less serviceable for their purpose, and it is as well known, that the ties usually project, slightly, in some instances, and, more in others, above the surface of the tracks, and an experienced section hand knows, that in passing along the track, he must encounter such obstacles as mentioned, as well as other slight obstacles, which may happen to get upon the track from one cause or another. The appellee does not claim, that the cross-ties having been laid upon the ballast, at the place of his mishap, was the cause of his injury, as he knew all about the condition of the track at that point, having assisted in the work, but, one of the cross-ties, whether one laid upon the surface of the ballast, or not, does not appear, was decayed, so that, when he stepped upon it, a portion broke off, or having theretofore broken off, slipped from under his foot, thereby causing him to be precipitated upon the ground.

It would be highly unreasonable to require a railroad company to maintain its cross-ties of such a degree of soundness, that a portion of a tie, would not give way, when a section hand stepped upon it, or to hold, that the company owed a section hand the duty of maintaining the cross-ties in such a sound condition, that portions would not, from decay, break off, when one should step upon it, or slip under his foot, when he should step upon it.

The appellee was an experienced man, in the work, he was undertaking to perform; it was a necessary part of his duties; he was provided with the customary lights to guide his footsteps, and all that was reasonably necessary to enable him to see and avoid any ordinary risks of danger.

To direct an experienced section hand, who is acquainted with the track, to proceed hurriedly in an emergency, to flag a train, at night, when supplied with the customary light to guide his steps, does not seem to be requiring of him any extraordinary risk. Hence, it is concluded, that the cause of appellee's injuries, was one of the ordinary risks, incident to his employment, and was not caused by the neglect of any duty, which his employer owed to him, and having thus proven no cause of action, the peremptory instruction to the jury, should have followed the motion for a directed verdict, for appellant, upon that ground, as well as the admission by the pleadings, that his own negligence caused his injuries. The instruction given was erroneous, as it was not based upon any issue made in the pleadings, and was otherwise, faulty, but, in as much, as the peremptory ought to have been given, for the two reasons, above stated, the merits of the instruction will not be, further, discussed. The appeal is therefore granted, the judgment reversed, and cause remanded for proceedings not inconsistent herewith.

Kelley v. Kelley.

(Decided March 11, 1919.)

Appeal from Boyd Circuit Court.

1. **Appeal and Error—Attorneys' Fees in Divorce Cases.**—The Court of Appeals will not determine questions relating to fees of attorneys in divorce and alimony proceedings, which have not been considered and passed upon by the circuit court.

2. **Appeal and Error—Supersedeas or Stay of Proceedings—Damages.**
—Damages will not be awarded upon the amount of a judgment superseded, upon the affirmance of a judgment, although a supersedeas bond has been executed, unless a supersedeas has been issued.
3. **Appeal and Error—Supersedeas or Stay of Proceedings—Damages.**
—Where a judgment has been superseded and the supersedeas issued, at any time, during the pendency of the appeal, damages will be awarded upon the amount of the judgment superseded, upon the affirmance of the judgment.
4. **Appeal and Error—Supersedeas or Stay of Proceedings—Damages.**
—Where a judgment for permanent alimony and costs, including attorneys' fees, has been superseded, upon the affirmance of the judgment, damages will not be awarded upon the amount of the costs, including attorneys' fees.
5. **Appeal and Error—Supersedeas or Stay of Proceedings—Damages.**
—Damages will not be awarded upon the affirmance of a judgment which has been superseded, unless the judgment is one, which may be enforced by an execution or similar process.
6. **Judgment—Personal Judgment.**—A judgment, which may be enforced by an execution of fieri facias, is a personal judgment for the recovery of a fixed sum of money, or for interest and costs, therein, or either.

B. O. BECKER, GEORGE B. MARTIN and JOHN L. SMITH for appellant.

JOHN F. HAGER and JOHN W. WOODS for appellee.

OPINION OF THE COURT BY JUDGE HURT—Overruling petition of appellant, for a modification and extension of the opinion, herein, and overruling certain motions of appellee, except for a judgment, awarding damages on supersedeas bond, which is sustained.

With reference to that portion of the opinion, in this case, which is sought to be modified and extended, it was not the design of the court to adjust the rights of the parties from mathematical calculations based upon the tables of mortality, but, the purpose was, in the event, the appellee desired to give up the house, to require the appellant to pay to her such a sum per month, thereafter, during her lifetime, and so long as she did not become the wife of another, as would reasonably provide her with a home, whether she lived a few or many years. If she does give up the house, she can not require the appellant to pay her the agreed present value of the house, in lieu of all monthly payments. The option is with him to make the monthly payments, or in lieu of them to pay to her

the present agreed value of the house, and counsel overlook the fact, that, if she should retain the house for twenty years, as suggested by them, the appellant is not required to pay to her its present value, or the value at that time but, may pay the \$50.00 per month, instead, and, if she should retain it, so long a time as suggested, according to human experience, touching the usual length of human life, there would be but a few years, during which he would be required to pay the monthly payments. The petition is overruled.

(1) The appellee filed in this court, a copy of a supersedeas bond, executed before the clerk of the circuit court, by the appellant, in pursuance to the provisions of chapter 2, of title xviii, of the Civil Code, and entered a motion for a judgment awarding damages upon the affirmation of the judgment appealed from, as provided by section 764, Civil Code.

(2) The appellee, further moved the court, as follows:

(a) To extend its opinion and to indicate to the circuit court, the amount of a fee to be paid the attorneys of appellee, for their services upon the appeal, and to give proper directions in regard to same.

(b) To allow interest on the judgment from July 1, 1918, or to reinstate the order, directing the payment of temporary alimony of \$250.00 per month, from July 1st, until October 1st. The last two motions, are overruled. With relation to the one, requesting this court to fix the amount of a fee for the services of the attorneys, for appellee, in this court, upon the appeal, and give proper directions to the circuit court in regard to it, it may be said, that is a matter about which the circuit court has never adjudicated, and, as a matter of course, could not appear upon the record before us. Further, this court, upon such a subject, is a court of review. While the appellee might be willing to have the questions adjudicated upon the record before us, we would not be at liberty to preclude any defense, which the appellant may have before the court of original jurisdiction, before which the parties may present their cases. Hence, we make no intimation touching the subject.

As to the motion, requesting, that interest be adjudged upon the amount of the judgment from July 1st, instead of from October 1st, or else to order the payment of temporary alimony, in the sum of \$250.00 per month, from

July 1st, until October 1st, it should be said, that the judgment appealed from, directed, that the payment of temporary alimony, at \$250.00 per month, should cease on July 1st, and that the judgment rendered, should not bear interest until October 1st, and this judgment was affirmed. These matters were considered, before the affirmance of the judgment. Under the particular facts of the case, the judgment of the circuit court, touching these matters, was not considered to be subject to criticism. The judgment, having been affirmed, will not be opened for review upon a motion.

(3) To determine, whether the motion to award damages upon the amount of the judgment superseded, upon its affirmance, should prevail, a statement of the facts, as they appear upon the record, is necessary. The judgment was rendered at the June term, 1918, of the Boyd circuit court, and appeal granted at that time. The transcript was filed in the clerk's office of this court, on the 16th day of December, 1918. A supersedeas bond, was executed before the clerk of the circuit court by the appellant, on the 1st day of October, 1918, but, a supersedeas was not issued by the clerk, until the 17th day of February, 1919, and after the opinion of this court, was handed down on the 4th day of February, 1919. The appeal having been granted by the circuit court, the supersedeas bond was properly executed before and accepted by the clerk of that court. Section 749, subsection 1, Civil Code. The bond having been executed before the clerk of the court, which rendered the judgment, and before the expiration of the time for filing the record, in the office of the clerk of this court, pursuant to section 738, Civil Code, it was the duty of the clerk of the circuit court, to issue the supersedeas. Section 749, subsection 2, Civil Code.

An appeal does not stay proceedings upon a judgment, unless a supersedeas is issued, and hence, damages will not be awarded on the affirmance of a judgment, where a supersedeas bond has been executed, unless a supersedeas was also issued. Section 747, Civil Code; *Hoskins v. Southern National Bank*, 24 R. 2250; 73 S. W. 786; *O. & N. R. R. v. Barclay*, 102 Ky. 16; *Reed v. Lauder*, 5 Bush 598; *Jones v. Green*, 12 Bush 127; *Asher v. Cornett*, 32 R. 1173. The supersedeas, however, having been issued, by the clerk of the circuit court, after the filing of the appeal in this court, and after the opinion having been handed down, but, before the issuing of the

mandate, and before the time for its issual, will the appellee be entitled to have damages awarded upon the amount of the judgment superseded, after its affirmance? The appeal having been granted by the circuit court, and the supersedeas bond executed before the time for filing the record in the clerk's office of this court, no one, other than the clerk of the circuit court, was authorized to issue the supersedeas, and it was clearly his duty to do so. He could not refuse to issue an execution upon the judgment, if requested to do so by appellee, unless he issued the supersedeas; and if he should fail to issue the supersedeas, and instead, issue an execution, after the supersedeas bond had been executed, as it was, it is clear, that he would have been liable in damages to appellant. If a clerk of the circuit court has taken the bond, within the time, within which, he is authorized to do so, the bond is valid, and the statute not limiting the time, within which he should issue the supersedeas, it seems, that a supersedeas issued, at any time, during the pendency of the appeal, at the least, would be valid, and would stay further proceedings upon the judgment. If the clerk had delayed ten days or thirty days after the execution of the bond, in the instant case, to issue the supersedeas, no one would scarcely contend, that it was not valid, and would not stay proceedings upon the judgment, thereafter, until the appeal was finally disposed of. *U. S. F. & G. Co. v. City National Bank*, 143 Ky. 699; *L. & N. R. R. Co. v. Lucas' Admr.*, 86 S. W. 683. The bond being valid, the supersedeas issued, at any time, during the pendency of the appeal, was valid, and created a stay of proceedings under the judgment. The appeal was still pending and undetermined, when the supersedeas was issued, on February 17th. Section 760, Civil Code, provides that, "No mandate shall issue, nor decision become final, until thirty days, excluding Sundays, from the day on which the decision is rendered." Hence, the decisions of this court do not become final, until the mandate is issued. *C. & O. Ry. Co. v. Kelley's Admr.*, 161 Ky. 660. Hence, although the supersedeas was not issued until after a decision of the case had been made on the 4th of February, the appeal was still pending on the date, the supersedeas was issued, and within the thirty days, excluding Sundays, after the decision, the parties may file petitions for a rehearing, or make other proper motions, and in such states of case, the pendency of the appeal is con-

tinued, until they are disposed of when a mandate may issue, as the final judgment upon the appeal.

The appellant insists, that the judgment was not such a one, as, within the provisions of section 764, Civil Code, damages should be awarded, upon its affirmance, in this, that it was not such a judgment as could be enforced, by execution or other similar process. Before the provisions of that section will authorize the awarding of damages in the sum of ten per centum of the amount of the judgment superseded, it must appear, that it is a final personal judgment for the payment of money, and which is enforceable by execution or other similar process, there can be no doubt. *Bell's Trustee v. Lexington*, 124 Ky. 463; *Shields v. Hinkle*, 19 K. L. R. 1363; *Remubaum v. Atkinson*, 105 Ky. 396; *Leofold v. Furber*, 84 Ky. 214; *Worsham v. Lancaster*, 104 Ky. 814; *Stamps v. Beatty*, *Hardin*, 345; *Rowan v. Pope*, 14 B. Mon. 102; *Woods v. Rodman*, 5 B. Mon. 45; *Sumrall v. Reed*, 2 Dana 65; *Talbott v. Morton*, 5 Litt. 326; *Hall v. Dineen*, 27 K. L. R. 886. Section 1650 Ky. Stats., provides, that "If a final judgment *in personam* be rendered in any court of record . . . for an ascertained sum of money, with interest and costs, or for either, a *fiери facias* may issue thereon." Section 1663 Ky. Stats., dealing with judgments in chancery, provides, that, "A final order or judgment for money, lands or other specific things, may be enforced by any appropriate writ of execution, allowable on a judgment at law, according to the nature of the case." That the judgment, in the instant case, was a personal judgment and for the collection of money, there can be no doubt, in so far as it directed the recovery, by appellee, of the sum of \$33,500.00, and her costs and attorneys' fees. The amount, directed to be paid, as alimony, and which was superseded, was a sum fixed and certain. It was directed to be paid on or before October 1, 1918. It bore interest from that date, by the express terms of the judgment. The judgment granted to the appellant, the right to satisfy the alimony allowed, by paying the sum of \$1,500.00 in cash, and the execution of five notes, for equal amounts, of the balance, with personal sureties, acceptable to appellee, or to discharge the judgment, by paying \$1,500.00 in cash, and executing and delivering five notes, each for an equal amount of the remainder, to be secured by certain stocks. The two latter methods, for satisfaction of the judgment for alimony, were to be

taken advantage of and performed on or before the first day of October, 1918, from which date, the allowance for alimony was to bear interest. They were privileges granted to the appellant, for the satisfaction of the judgment, if he chose to exercise them, within the time allowed. The appellant did not pay the alimony adjudged, on or before October 1, 1918, nor did he elect to satisfy the judgment, by the payment of \$1,500.00, in cash, and the execution and delivery of the notes secured in either of the ways provided, on or before October 1, 1918. Hence, it seems, that the judgment became a final one for the payment of money, and appellee was entitled to have an execution of *feri facias*, thereon. The fact, that the court, in the conclusion of the judgment, ordered, that the cause be retained upon the docket, for such further steps and proceedings as might be necessary for enforcing the judgment, was not an adjudication, withholding from the appellee, the lawful means of enforcing her judgment, but, has reference to such remedies for enforcement, as pertain peculiarly to equity, in addition to the means of collecting a judgment, at law. Neither does the language of the judgment, where it says, that an execution is not, now, awarded, have the effect of withholding, from appellee, the right to enforce the collection by execution, after October 1, 1918, as the language, above stated, is followed, immediately, by language, which provides that, it shall be paid on, or before October 1, 1918, and the same requirement appears, with reference to the same matter at another place or places in the judgment. It can only be inferred, that the language for the present withholding an execution, has reference to the time between the rendition of the judgment, in June, 1918, and the first day of October, thereafter, as it is apparent, that the court, after having ordered the discontinuance of the payment of temporary alimony, and given appellant three months thereafter, within which to satisfy the judgment, for permanent alimony, without interest thereon until October 1, 1918, did not intend, after having awarded a judgment for the recovery of the alimony and fixed the date for its payment, to withhold, from appellee, all means of enforcing it. The appellant, having prevented the enforcement of the judgment, by the execution of the supersedeas bond, it is but just, that he should pay the penalty, which the law exacts, in such cases. It is, therefore, ordered, that damages be awarded, upon the prin-

cipal sum of \$33,500.00 which was superseded, but damages should not be awarded upon the costs, including attorneys' fees allowed, as a party is not entitled upon an affirmance of a judgment to have the damages, provided by section 764, Civil Code, awarded upon the amount of the costs recovered. *Bergen v. Farmers' & Traders' Bank*, 9 R. 194; *Edelson v. Edelson*, 173 Ky. 252. All members of the court sitting.

Nelson v. Kentucky River Stone & Sand Company.

(Decided March 11, 1919.)

Appeal from Anderson Circuit Court.

Master and Servant—Workmen's Compensation Act.—In holding that the compensation for specific injuries, provided in section 18 of the Workmen's Compensation Act, was confined to those injuries and no others, it was not intended to lay down the rule that the Workmen's Compensation Board could not use the schedule contained in section 18 as a standard by which to measure the compensation to be allowed for injuries not specified, but falling within the general clause awarding compensation, "in all other cases of permanent partial disability," etc.

LILLARD CARTER and R. L. BLACK for appellant.

O'NEAL & O'NEAL and F. R. FELAND for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Extending former opinion and overruling petition for rehearing.

Upon a reconsideration of the question involved, we see no reason to depart from our former opinion, but deem it proper to say, that in holding that the compensation for specific injuries, provided in sec. 18 of the Workmen's Compensation Act, was confined to those injuries and no others, it was not intended to lay down the rule that the Workmen's Compensation Board could not use the schedule contained in section 18 as a standard by which to measure the compensation to be allowed for injuries not specified, but falling within the general clause awarding compensation, "in all other cases of permanent partial disability," etc.

Wherefore, the petition for rehearing is overruled and the opinion extended as above indicated.

Hughes, et al. v. Parsons.

(Decided March 11, 1919.)

Appeal from Jackson Circuit Court.

1. **Landlord and Tenant—Lease—Oil.**—A lease of land for five years, or longer if found profitable, for the purpose of drilling for oil and gas, made for the recited consideration of \$1.00, cash in hand paid, and certain royalties on the oil or gas produced, and which provides that the lessee shall begin operations within a year and, in the event of his failing to do so, that he shall pay during the period of delay an annual rental of twenty-five cents per acre on the land, is not a unilateral contract.
2. **Landlord and Tenant—Lease—Oil.**—The main consideration to the lessor for the making of such a contract is the development of the property and payment to him of the promised royalty, and to the lessee it is the profits to be realized from the development of the property. Consequently the contract does not permit the lessee, in opposition to the wishes of the lessor, to delay the development of the property for an unreasonable time and thereby extend the lease indefinitely by the payment of a nominal annual rental. In case of unreasonable delay by the lessee in beginning operations under the lease after the first year, the remedy of the lessor is to notify the lessee that he will not accept further payment of the annual rental and permit his land to remain idle, but will require the lessee to at once begin, in good faith, performance of the contract; and if after such notice and demand, the lessee does not begin the development of the property within a reasonable time, the lessor may have the lease forfeited, resorting to a court of equity for that purpose.
3. **Landlord and Tenant—Lease.**—Evidence examined and held insufficient to show that the lease sought to be cancelled was obtained by fraud on the part of the lessee.

A. W. BAKER for appellants.

J. R. LLEWELLYN for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

In this action, brought in the court below by appellants, H. C. Hughes and Euphemia Hughes, his wife, against the appellee, G. M. Parsons, the relief sought was the cancellation of an oil and gas lease executed by appellants to one C. W. Hundley June 5, 1916, and assigned by the latter to the appellee, G. M. Parsons January 17, 1917. The lease conveyed to the lessee and his assigns the right to drill for and remove all oil and gas upon and under a tract of land lying in Jackson county, described

in the lease, for a period of five years and as much longer as oil and gas is found thereon. The grounds alleged in the petition for the cancellation of the lease were: (1) that the contract is unilateral in form and character and therefore void for want of mutuality; (2) that it was procured by fraud and, for that reason, is also void. The averments of the petition were traversed by the appellee's answer and the parties took proof. On the hearing the circuit court dismissed the appellants' petition. The latter complain of that judgment and have appealed.

Because of its great length the lease is not copied in the opinion, but its material features are as follows: (1) It conveys to the lessee the right to enter the land described therein and drill for and remove therefrom oil or gas for a period of five years from the date of the lease, and as much longer thereafter as oil and gas are found thereon, with the right to the use of oil, gas, or water therefrom and all rights and privileges necessary or convenient for such operations; also the right to remove at any time all property, pipes and improvements placed or erected in or upon the land by the lessee; (2) it requires the lessee to drill a well upon the premises within one year from the date of the lease, or to thereafter pay to the lessors quarterly a yearly rental of 25 cents per acre, in advance, until a well is completed or the property leased reconveyed to the lessors; (3) that should oil be found in paying quantities the lessee will deliver to the lessors free of charge into tanks or pipe lines one-eighth part of all crude oil produced or saved from the premises; and should gas be found in paying quantities that the lessee will pay the lessors \$100.00 every year for the product of each well while the same is being sold off the premises, the lessor to have gas free of cost to heat and light one dwelling house during the same time at the well, to be used at the lessors' risk; (4) that the lessee would bury pipe lines for oil in cultivated fields below plough depth when requested to do so, and pay for damage done growing crops while drilling; (5) that the lessee may at any time remove all his property and reconvey the premises granted, in which event such payments as may have been made the lessors during the continuance of the lease are to be retained and accepted by them as the full stipulated damages for nonfulfillment of any part of the contract by the lessee. In addition to

the matters above set out as parts of the consideration passing from the lessee to the lessors for the conveyance, it is recited in the beginning of the lease that it is made in consideration of \$1.00, paid the lessors by the lessee, the receipt of which is acknowledged.

The appellants rest their right to the relief sought on the opinion of this court in *Killabrew v. Murry*, 151 Ky. 345. But it will be found that the phosphate lease in that case differs in several essential particulars from the lease in the instant case. In that case the stipulated life of the lease was ten years, with the right to the lessee to extend it on certain conditions of which he was to be the sole judge. The writing was silent as to when the lessee should begin operations upon the leased premises, and left it to his election whether he would do so in ten years or at all, only requiring of him when he did begin a grossly inadequate royalty on the phosphate mined; and until he did begin operations, the payment of an inadequate sum annually by way of rent to the lessor without fixing any time for its payment. In addition, the \$1.00, mentioned in the beginning of the writing as the primary consideration for the lease, was never paid by the lessee and only one payment of rent was made by him, although three and one-half years of the lease had expired without his beginning operations thereunder before the lessor demanded of him its forfeiture, together with the surrender of the possession of the leased premises, and notified him of her purpose to sue for the cancellation of the lease. It was held that the contract was so lacking in reciprocity of obligation as to leave it wholly to the option of the lessee whether or not he would carry out the object of the lease, and at the same time render the lessor powerless to compel the performance of any of its covenants by him, which made the lease a unilateral contract and for that reason void.

There was, however, in *Killabrew v. Murry*, another and even stronger cause than its unilateral character, that moved us to adjudge the lessor entitled to the cancellation of the lease, viz: the fraud practiced by the lessee in procuring its execution. In other words, it was clearly established by the evidence that the lessor was induced to execute the lease for a grossly inadequate royalty of 25 cents per ton on the phosphate to be mined, upon the representation of the lessee that such was the customary price paid under similar leases in Tennessee, when in

fact the customary royalty in Tennessee at that time was \$1.00 to \$1.10 per ton, instead of \$0.25 per ton, which was known to the lessee but not known to the lessor at the time the lease was executed. On this showing of facts we held that the falsity of the representation thus made by the lessee was of itself sufficient to authorize the cancellation of the lease.

From what has been said of the lease involved in *Killabrew v. Murry*, *supra*, and that in the instant case, it will be seen that though there are some features of slight resemblance between them, in the features or matters essential to the validity of such a lease, they are greatly unlike both in language and meaning. Without further comparisons of the two leases it is sufficient to say that the opinion in *Killabrew v. Murry* gives no support to the attack here made by appellants on the lease they executed to appellee. On the other hand it may be remarked that the lease here assailed is in terms and meaning like numerous others that both before and since the decision in *Killabrew v. Murry* have been declared valid. The most recent of these is the lease involved in *Warren Oil and Gas Co., et al. v. Gilliam*, 182 Ky. 807, the covenants of which are so substantially like those of the lease we are here considering that the language is almost identical. In that lease as in this the term was five years and as long thereafter as oil or gas was produced by the lessee or assigns. The consideration was 75 cents cash and the covenants of the lease; the agreed royalty was one-eighth of all oil and gas produced and saved on the leased premises. The lessee agreed to begin a well on the premises within one year or pay at the rate of 25 cents an acre per year, for each additional year such beginning is delayed; and further that unless the well was completed or rental paid as stipulated the lease should become null and void. Shortly thereafter the lessee assigned the lease to Gilliam, who failed to begin the well within the year stipulated. The lessor then undertook to treat the lease as forfeited and executed another similar lease to a different party. Thereupon Gilliam brought the action asking an injunction against the new lessee restraining him from interfering with his (Gilliam's) possession of the leased premises and asking that his title to same be quieted. The circuit court granted Gilliam the relief asked and on appeal to this court the judgment was affirmed. In the opinion we, in part, said: "It will be ob-

served that the lease in question provides that the lessee was to begin a well on the premises within one year from the date of the lease, or pay at the rate of 25 cents an acre per year for each additional year such beginning was delayed. In construing such leases, we have taken the position that the main consideration is the development of the property, and the payment of the royalty, and that the lessee cannot, in opposition to the wishes of the lessor, refuse to begin the development of the property for an unreasonable time, and extend the lease indefinitely for the payment of a mere nominal rent. *Monarch Oil, Gas and Coal Co. v. Richardson*, 124 Ky. 612; *Dinsmoor v. Combs*, 177 Ky. 470. However, the right of the lessor to forfeit the lease for non-development cannot be arbitrarily exercised. He must first notify the lessee that he will no longer accept the annual rentals and permit his land to remain idle and undeveloped, but will require the lessee to execute the contract according to the intention of the parties by beginning its development in good faith, for if, after such notice and demand, the lessee does not begin the development within a reasonable time, the lessor may then have the lease forfeited. *Monarch Oil, Gas and Coal Co. v. Richardson*, *supra*. Here, the lessor did not, at any time, demand that the lessee begin operations and give him a reasonable opportunity to do so. That being true, there is no basis for the contention that the lease in question was forfeited because of the lessee's failure to begin operations. Equally without merit is the contention that the lease in question was forfeited because of the lessee's failure to pay the stipulated rental in advance. Under the lease in question, the stipulated rental was not payable for the first year, but only for each additional year the beginning of operations was delayed. There is nothing in the contract from which it can be inferred that the rental was payable in advance. In construing a similar lease in the case of *Dix River Barytes Co. v. Pense*, 123 S. W. 263, we held that where no operations were commenced during the second year, the stipulated rental was not due until the end of that year. That being true, the tender of the rental for the second year before the end of that year, in the manner provided by the contract, was sufficient to avoid a forfeiture."

While one or more of the grounds of attack made upon the lease in the instant case were not urged against the

lease in *Warren Oil and Gas Co. v. Gilliam*, the sameness of the two leases doubtless would have led to the statement in the opinion in the latter case of any cause for which the court, would have felt compelled to declare the lease a unilateral contract, and for that reason, or any other, void. As said in that case, if the appellee in this case unreasonably delays the beginning of operations upon the leased premises, in order to obtain a forfeiture of the lease, the remedy of the lessors will be to notify the lessee that they will not accept the stipulated annual rental and demand immediate performance of the covenants of the lease; and if the appellee does not begin performance, in good faith, within a reasonable time, they may then have the lease cancelled.

The opinion in *Warren Oil and Gas Co., et al. v. Gilliam*, *supra*, removes any doubt of the correctness of the judgment appealed from, unless the lease in question was obtained by fraud, as to which issue it seems sufficient to say that the alleged fraud does not appear to have been shown by the evidence. It is difficult to comprehend how appellants could have believed they were making the lease to the Wood Oil Co. through appellee, as claimed, when the name of the lessee Hundley was in the contract when they executed it, and with such knowledge they made no complaint of the alleged fraud until after Hundley assigned the lease to appellee. While there was some contrariety of evidence on the question of fraud, we are not prepared to say that the chancellor's decision of that question is not sustained by the evidence.

Finding no legal cause for disturbing the judgment it must be and is affirmed.

J. S. Minor v. J. B. Gordon.

J. S. Minor v. Mose Minor.

J. S. Minor v. Reynolds.

(Decided March 11, 1919.)

Appeals from Jefferson Circuit Court
(Common Pleas Branch, First Division).

Appeal and Error—Failure to File Brief—Effect.—In the absence of a brief from the appellant specifying the errors for which

a reversal is asked, the Court of Appeals will assume that no errors were committed by the trial court, or that they have been waived; and, consequently, that the judgment appealed from correctly determined the rights of the parties.

CLEM W. HUGGINS for appellant.

JOS. S. LAWTON and W. S. CRAWFORD for appellees.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is the second appeal of the first above styled case, and the second motion for an appeal in the second and third cases. The cases have been twice tried together in the court below. On the first of these trials the appellees each recovered a judgment against the appellant; that in favor of J. B. Gordon being for \$500.00; that in favor of Mose Minor for \$400.00, and that in favor of Ottie Reynolds for \$200.00.

On the first appeal of the three cases, the first prosecuted as a matter of right because the amount in controversy was \$500.00 and the others granted by this court because the amount in controversy in each was as much as \$200.00, and less than \$500.00. All the judgments were reversed because of error in the trial court's instructions to the jury and the several causes remanded to that court for another trial consistent with the opinion. (See opinion in *Minor v. Gordon*, etc., 170 Ky. 609; and response to petition for rehearing, 171 Ky. 790.) The return of the cases to the circuit court was followed by the second trial, in which each of the appellees recovered of J. S. Minor a judgment for the same amount recovered on the first trial. The latter was refused a new trial and has again appealed, the appeal from the judgment in favor of J. B. Gordon for \$500.00 being taken as a matter of right and those from the judgment in favor of Mose Minor for \$400.00, and Ottie Reynolds for \$200.00, applied for by motions entered in this court.

We have not been favored with a brief by the appellant or appellees, and in the absence of a brief from the appellant specifying the errors for which a reversal is asked, we will assume that no errors exist, or that they have been waived and, consequently, that the judgment appealed from correctly determined the rights of the parties. *Commonwealth v. Lexington & Eastern Ry. Co.*, 167 Ky. 442; *Continental Ins. Co. v. Ramsey*, 160 Ky. 158; *Crawford v. Wiedeman*, 158 Ky. 333;; *Brown v. Daniels*, 154 Ky. 267.

For the reasons indicated the judgment in the appeal of *J. S. Minor v. J. B. Gordon* is affirmed. The motions for an appeal in the cases of *J. S. Minor v. Mose Minor* and *J. S. Minor v. Ottie Reynolds* are overruled, the appeals refused, and the judgment in each of these cases affirmed.

Walker, et al. v. American Snuff Company.

(Decided March 11, 1919.)

Appeal from Christian Circuit Court.

Appeal and Error—Absence of Brief—Presumption.—In the absence of a brief for appellants, specifying the errors for which a reversal is asked on appeal, it will be presumed that no errors exist and that the judgment is correct.

LINTON & CLARK for appellants.

JAMES BREATHITT for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

This suit was brought by the American Snuff Company against W. M. Walker and J. L. Humphrey, to enjoin Walker from selling a certain crop of tobacco to Humphrey, and to compel him to deliver the tobacco to plaintiff, pursuant to the terms of the contract by which he sold and agreed to deliver the tobacco to plaintiff. The suit was based on the claim that a portion of the tobacco was necessary to meet the demands of plaintiff's business, and that the other portion was necessary to enable plaintiff to comply with a contract by which it had sold that portion to others; that other tobacco of like character could not be purchased in the market; that plaintiff had no adequate remedy at law because damages would not compensate it for the loss incurred; that Walker was insolvent and that plaintiff would suffer irreparable injury if the injunction were not granted. On final hearing, the relief prayed for was granted, and the defendants appeal.

The case is here without brief for appellants. In the absence of a brief, specifying the errors for which a reversal is asked, it will be presumed that no errors

exist, and that the judgment is correct. *Commonwealth v. Lexington & E. R. Co.*, 167 Ky. 442, 180 S. W. 532; *Continental Insurance Co. v. Ramsey*, 160 Ky. 441, 169 S. W. 855; *Crawford v. Wiedemann*, 158 Ky. 333, 164 S. W. 981; *Brown v. Daniels*, 154 Ky. 267, 157 S. W. 3.

Judgment affirmed.

Archie, et al. v. Brown.

(Decided March 11, 1919.)

Appeal from Greenup Circuit Court.

1. **Contracts—To Obstruct Justice—Void.**—A contract or agreement entered into for the purpose of obstructing or interfering with the administration of justice is void as against public policy and the courts, when called on to adjudge the rights of the parties under such a contract, will refuse to have anything to do with it.
2. **Contracts—That Secured Release of Prisoner, When Not Void as Against Public Policy.**—Where a father was indicted and confined in jail for failing to provide for his family, under a statute providing that he might be released by the court if he made provisions for them, a contract entered into by the terms of which he made provisions for his family and was thereupon released from custody by order of the court, was not void as against public policy, as its purpose was not to obstruct the administration of the law.
3. **Contracts—That Secure Release of Prisoner, When Not Void as Against Public Policy.**—Where the prosecuting witness with the knowledge and consent of the prosecuting attorney enters into a contract by which the prisoner may be released if the court consent to it will not be void as against public policy if the purpose of the contract is to carry out the intention of the statute under which the prisoner was arrested, and the disposition of the prosecution is left entirely in the hands of the court and the prosecuting witness is ready and willing to appear when called on.

J. B. BENNETT for appellants.

E. E. FULLERTON for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Affirming.

John Archie was the first husband of Addie Brown, the appellee, and three children were born of their marriage. They resided in Lawrence county, Ohio, and

about 1912 John Archie abandoned his wife and children and soon thereafter he was indicted by the grand jury of Lawrence county, Ohio, for the offense of failing to provide for his wife and children, but was not arrested under the indictment until January, 1915, when he was taken into custody and confined in the jail of Lawrence county. A few days after this his father and brothers, who are the appellants, entered into the following contract with his former wife, the appellee; "Whereas the said John Archie is at present confined in the Lawrence county jail under an indictment for failure to provide for his children (. . .) and whereas an agreement as hereinafter set out has been effected between all interested parties, and whereas it is the special desire of the said first party to reduce said agreement to writing, it is therefore agreed and considered between the said parties as follows:

"Said first party, in consideration of the things and matters to be hereinafter set forth and agreed to by said second parties does hereby agree and consent, without waiving any rights whatsoever under the law, that John Archie should be released from his present confinement subject to the consent of the prosecuting attorney and the court from which said indictment is issued.

"Said John Archie as one of said second parties, being the father of three children now in the custody of said first party does hereby agree and bind himself to pay to said first party for the use and support of said three children the sum of \$15.00 per month, said sum to be \$5.00 each for said three children. The said William Archie, Ed Archie and Norman Archie, hereby agree to and bind themselves that should said John Archie fail in any way to pay said \$15.00 per month as herein agreed by him that they will jointly and severally pay said sum of \$15.00 as above set forth to said first party for the uses and purposes above set forth. And they each for himself guarantee the payment of said sum.

"It is mutually agreed, however, between any and all parties herein interested that upon the arrival of any one of said children at the age of sixteen years then said payment is to be decreased by \$5 00 per month for each child thus arriving at said age. And the same is to be true in case either or all of said children should die before their arrival at said age of sixteen years. It is further agreed that should said John Archie die then the

said William Archie, Ed Archie and Norman Archie are each released from any further obligation under this contract."

John Archie having failed to pay the sums stipulated in the contract, this suit was brought by Addie Brown in September, 1915, against the sureties in the contract to recover the unpaid installments, and after the case had been prepared and submitted there was a judgment awarding Addie Brown the relief sought.

A reversal of this judgment is sought upon the ground that the contract was void as against public policy because its purpose and effect was to obstruct the course of justice by compounding a felony.

It is provided in the statutes of Ohio that if a father who is able to do so fails or refuses to provide with the necessaries of life his wife or children, he shall be imprisoned in the jail for not less than six months nor more than one year, or in the penitentiary not less than one nor more than three years. And further provided that if a person, after conviction for a violation of this statute and before sentence, appears before the court in which the conviction took place and enters into a bond to the state of Ohio in a sum to be fixed by the court at not less than five hundred dollars with surety as approved by the court, conditioned that he will provide for his wife and children in a sufficient way, the sentence may be suspended.

In the answer to the petition the sureties in the contract set out these provisions of the Ohio statutes and pleaded that after this contract was entered into and solely by virtue thereof John Archie, who was then confined in jail, was released upon his own recognizance, and subsequently the indictment against him was filed away.

Mrs. Brown testifies that after her husband abandoned her and her children she procured an indictment against him under the statute heretofore set out and was ready and willing at all times to appear as a witness against him for his failure to support herself and children; that after he had been arrested and lodged in jail his father and brothers induced her to enter into the contract sued on but that she had nothing to do with his release from the jail on his own recognizance thereafter or the subsequent dismissal of the indictment against him; that she did not know that he would be released

from jail or that the indictment would be or had been filed away; that nothing was said at the time or before the contract was entered into in respect to either of these matters; that she was induced to execute the contract solely because she was desirous of having some provisions made for the support of her children and was not influenced by any other cause in entering into it; that the contract was prepared by a lawyer employed by the sureties, and the prosecuting attorney of Lawrence county, Ohio, was present when it was signed but she was not represented by counsel.

Mr. Cooper, the prosecuting attorney, testified in substance that it was the practice and custom in the court to release a prisoner in jail charged with the offense John Archie was guilty of when it appeared that satisfactory arrangements had been made to support his wife and children; that the purpose of the statute was to secure for the wife and children a support and whenever this was done the ends of the law were regarded satisfied and the delinquent parent, if in jail, released from custody and the indictment against him filed away. He said: "It was our custom to release them upon their own recognizance and let them out of jail in some manner—sometimes the indictment or warrant would be dismissed and other times it would be continued off of the docket and sometimes they would . . . take a suspended sentence. . . ." He further said that the disposition to be made of a person under an indictment for a charge like this was lodged exclusively, under the practice, in the court and prosecuting attorney; that Addie Brown did not at any time fail or refuse to appear as a witness against John Archie or have any power or authority to secure his release from jail or the dismissal of the indictment against him; that in his opinion the court had the right in cases like this to discharge the defendant upon his own recognizance and give him an opportunity to provide for his wife and family; that this practice was followed in more than half the cases of this kind; that after the contract, which appeared to make satisfactory provision for the support of Mrs. Brown and her children had been entered into, Archie was released from custody on his motion but the indictment was left pending against him until some months afterwards when it was filed away; that there was no understanding or agreement whatever between himself, or any person else,

so far as he knew, and Mrs. Brown that Archie should be released from custody or the indictment against him filed away.

Under the circumstances of this case as we have related them we do not think this contract violated any rule of public policy or hindered in any way the administration of the law. On the contrary the sole purpose of the contract was to carry out the intention of the law.

It is of course a familiar principle that any contract or agreement entered into for the purpose of obstructing or interfering in any manner with the administration of justice is void as against public policy and the courts when called on to adjudge the right of the parties under such a contract will refuse to have anything to do with it, leaving the parties in the position in which they placed themselves without giving to either the aid of the law to enforce the provisions of the contract. Illustrative cases on this subject are: *Lucas v. Allen*, 80 Ky. 681; *Averbeck v. Hall*, 14 Bush 505; *Gordon v. Gordon*, 168 Ky. 409; *Powell v. Flanary*, 109 Ky. 342.

Now it is true that Mrs. Brown agreed that John Archie "should be released from his personal confinement subject to the consent of the prosecuting attorney and the court from which said indictment is issued," but under this stipulation in the contract Mrs. Brown did not agree not to appear against Archie as a witness when wanted nor did she have any control over the disposition that might be made of the indictment or prosecution against him. So far as she was concerned she entered into the contract in perfect good faith and without the slightest intention of obstructing in any way the due administration of the law. The prosecuting attorney, who was present when the contract was entered into, was also acting in entire good faith and without having any purpose to assist in any way in interfering with the administration of justice.

It is also true that when the agreement was entered into and was found by the prosecuting attorney to make satisfactory provision for the wife and children of Archie the court on his motion released Archie from jail and subsequently dismissed the indictment against him, but this course was customarily pursued in cases like this when the objects for which the statute was enacted had been attained.

As we understand it the purpose of the statute as administered by the court was not so much the punishment of the offending parent as the protection of his wife and children, and when provision had been made for them the purpose of the statute was considered by the court as having been fulfilled.

The entire record shows in a very satisfactory way that the contract was not entered into for the purpose of obstructing or hindering in any manner or form the course of justice and that no thought of anything of this kind was in the mind of Mrs. Brown or the prosecuting attorney, who, being present, assented to the propriety and wisdom of the contract. It further shows that Mrs. Brown had nothing whatever to do with releasing Archie from jail or dismissing the indictment against him, as the disposition of these matters was exclusively within the control of the court. It further shows that she did not at any time or in any manner manifest any disposition not to appear against him; she simply consented that, if it was agreeable to the court that Archie might be released from custody, she had no objection.

In short, after as well as before the contract was entered into, the court had full control of the prosecution and the court, after it had been made to appear that Archie had satisfactorily arranged for the support of his children, permitted him to be released from custody and the indictment against him dismissed. This was the action of the court with a full knowledge of all the facts and not the result of anything that Mrs. Brown did or said except in so far as her entering into the contract contributed to bring about his discharge. And when a person enters into a contract with the consent and approval of the court and for the purpose of accomplishing the end to be attained by the law it cannot be said that such a contract was void as against public policy or tended to obstruct the administration of justice.

Wherefore the judgment is affirmed.

Schriver, Trustee, et al. v. Frommel, et al.

(Decided March 14, 1919.)

Appeal from Campbell Circuit Court.

1. **Trusts—Compensation of Trustee.**—A trustee, even though interested in the trust property, is entitled to compensation for his services, unless estopped by express or implied contract.

2. **Trusts—Compensation of Trustee.**—Where the will of the father of the parties, fixing the compensation of his executors and trustees at \$1,500.00, was probated and at the same time a trust deed was executed to one of the parties requiring of him the same duties as the executors and trustees under the will would have had to perform and without changing the provision of the will as to compensation, held that the trustee is entitled to an allowance in that amount, which is very moderate compensation for the services performed.

WM. U. WARREN for appellants.

JOHN T. HODGE, OSCAR P. GRISCHY and ELMER W. GRISCHY for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

The only question involved upon this the second appeal in this case, is whether or not the trustee is entitled to compensation for his services in administering the trust created in the manner fully set out in the opinion on the former appeal, which is reported in 179 Ky. 228.

Upon the return of the case to the lower court, an order was entered directing the trustee to settle his accounts with the master commissioner, and upon that settlement he asked and was allowed by the master the sum of \$1,500.00 for his services and to pay his brothers, George and Robert, for the assistance they had rendered him in the management of the trust property. To this allowance by the master appellee filed an exception, which is **sustained** by the chancellor, and judgment was entered denying to the trustee any compensation for himself or his assistants for their services in administering the trust.

It will not be necessary to consider the question of allowance to the assistants employed by the trustee, since that is a matter between them and the trustee, which is not here, as they are not asking any allowance, nor could they have done so, since they are not trustees under the trust deed, and the will of the father by which they were made trustees of his estate was superseded by the trust deed, although we think the will is so closely connected with the deed as to form a part of the whole transaction and require a consideration of its provisions upon the question of compensation for the trustee under the deed.

Prior to the American Revolution it was the common law rule that a trustee was not entitled to compensation for his services in respect to his trusteeship, in the ab-

sence of any provision in the order of the court appointing him, or of a contract or stipulation with the parties, and this rule was enforced in this country and in this state at an early period as a rule of the common law. (39 Cyc. 480.) But from the very first, the soundness of this rule was questioned in this country, and the accepted rule at the present time is that unless otherwise regulated by statute or contract, courts of equity will exercise a just discretion and make or withhold allowance as they consider the particular circumstances require. (39 Cyc. 481.)

In this state by statute, administrators, executors and guardians are allowed commissions for their services whether or not they are interested in the trust estate, but there has been no legislative action with reference to compensation to trustees. This court has, however, in numerous decisions, expressed its disapproval of the old common law rule, and in *Phillips' Admr. v. Bustard*, 1 B. Mon. 348 (1841) exposed the fallacy of the grounds upon which it was supposed to rest, and concluded the discussion of the question thus:

"Is there now, therefore, any sufficient reason here, for applying a rule so harsh and unreasonable to the solitary class of cases denominated express technical trusts? We think not.

"For similar reasons, the courts of Pennsylvania and of our parent state Virginia, have decided that trustees may be entitled to compensation without any express direction or contract therefor. See 3 Binney 457; 1 Wash. 246; 4 H. & Mun. 415. And this appearing to be intrinsically just, not forbidden by policy, and not only not inconsistent with any analogy in our local jurisprudence, but perfectly consistent with its complete harmony, we do not feel authorized to repudiate it and blindly adhere to the old English rule, the reasons for which, if ever good, are now altogether inapplicable in this age and country, whenever it may be presumed that compensation was expected and seems to be reasonable and just."

In no case in this court since that opinion was rendered has its reasons or conclusions been attacked or questioned, but compensation has been allowed to trustees in all cases for their services, unless there was an express or implied agreement to the contrary.

Counsel for appellee concedes that the old common law rule has been abrogated in this state, insofar as

strangers to the trust are concerned, but insists that where the trustee has an interest in the trust estate, he has no right to compensation in the absence of a stipulation therefor. This contention is based upon *Miles v. Bacon*, 4 J. J. Marshall, 457, decided in 1830, wherein the court enforced the old common law rule where the trustee had an interest in the estate, but this opinion was based upon the old common law rule, which had theretofore been enforced in *McMillan v. Scott*, 1 T. B. Mon. 150 (1824), both of which, however, antedated by a number of years the repudiation of the rule in *Phillips' Admr. v. Bustard*, *supra*.

Not only has there been no recognition or even discussion in any case in this jurisdiction since *Phillips' Admr. v. Bustard*, *supra*, was decided of the old common law rule, but upon the other hand in numerous cases the right of trustees to compensation has been accepted as a matter of course, and the only controversy since that time about compensation appearing in any of the decisions, is as to the amount. (See *Phillips v. Burton*, 107 Ky. 88; *Central Trust Co. v. Johnson*, 25 Ky. L. Rep. 55; *Mercer County v. Pearson*, 24 Ky. L. Rep. 1368; *Kentucky Natl. Bank v. Stone*, 11 Ky. L. Rep. 948; *Pearcy, &c. v. Greenwell, &c.*, 80 Ky. 616; *Patrick v. Patrick*, 135 Ky. 307.) It is true that in none of these later cases did it happen that the trusteeship was coupled with an interest, but the repudiation of the old common law rule in this jurisdiction was based upon the conception that the "laborer is worthy of his hire," and the fact that compensation having been provided for by statute for administrators, executors and guardians, compensation to trustees was justified and demanded by analogy. On the very same grounds and by parity of reason as well as analogy, the trustee should be paid reasonable compensation for his services even though interested in the estate, unless by express or implied contract he is to receive no compensation therefor, because his services are none the less valuable to other interested parties, and no such distinction is made in the cases of administrators, executors and guardians.

It is also insisted by counsel for appellee that this trust was nothing more in effect than a provision for expediency in the management of a partnership business of parties having equal joint interests in the trust estate, and properly comes within the rule that a partner is not

entitled to compensation for his services in the management of affairs of the partnership; but this contention is wholly without merit, because while the parties owned the property jointly, there was no partnership whatever in its management, but that by express agreement was delegated solely to the trustee.

The only questions remaining are whether the trusteeship was accepted under circumstances which imply a contract for compensation, or as stated in *Phillips v. Bustard*, from which "it may be presumed compensation was expected and seems to be reasonable and just" and if so, the amount at which same should be fixed. It is upon these two questions that we think the will of the father has a bearing, although abrogated almost entirely by the trust deed. It was provided in the will of the father that the executors and trustees therein named should receive as compensation for the same services as the trustee under the deed was required to perform, the sum of \$1,500.00, and it seems to us, under the circumstances and in the absence of any provision in the trust deed disturbing this provision of the will, most reasonable that the acceptance of the trusteeship requiring the performance of the same services, was in anticipation of such compensation. In fact since the will was probated, it seems nearly impossible to avoid the conclusion that such of its provisions as were not abrogated by the trust deed executed between the parties upon the same day it was probated, are still in full force, and we are unable to escape the conclusion that under the circumstances here, the trustee is entitled as compensation, out of which of course he must pay any assistants employed by him, the sum of \$1,500.00 for his services, which, except for the provisions of the will fixing that sum as compensation, would be entirely inadequate, since the trustee, during the ten years he had charge of and managed the trust property, collected rents in small sums from a large number of tenants, amounting to \$57,806.47, out of which he paid for repairs, taxes and insurance, \$30,739.78, and distributed the balance among the trustees, together with about \$49,000.00 for portions of the property sold by the joint efforts of all parties.

Wherefore the judgment is reversed with directions to allow the trustee \$1,500.00 as compensation for his services.

Williams v. Louisville & Nashville Railroad Company.

(Decided March 14, 1919.)

**Appeal from Kenton Circuit Court
(Common Law and Equity Division).**

Appeal and Error—Verdict—Evidence.—A verdict returned by a jury, under proper instructions, will not be disturbed unless it is clearly and palpably against the weight of the evidence.

B. F. GRAZIANI for appellant.

S. D. ROUSE and BENJAMIN D. WARFIELD for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

There is but one question to be decided on this appeal, viz.: Is the verdict flagrantly against the evidence?

The appellant became a passenger on a train of the appellee company, at Latonia, Ky., June 24, 1916, having purchased a ticket to Glencoe, Ky. She got on the rear end of the first coach and having reached the platform of the car someone directed her to turn toward the right, which would be in the direction of the ladies' coach; this she did, and as she started to enter the door of the latter coach she claims that an employe of the company either threw or pitched a heavy suit case upon the platform which fell upon her right foot, thereby producing the injury for which she sought damages.

The testimony of the appellant is corroborated by her daughter, who was with her at the time. These are the only two witnesses testifying on this point. The flagman, in behalf of the appellee, in stating what happened on the occasion complained of by the appellant, thus testifies: "Q. Explain to the jury just what your duty as flagman was on that train? A. At this station to receive passengers and assist them with their baggage. This lady was boarding it, on the steps coming up on the lower side. I was helping some other passengers up; I put up a suit case like that. As I set it down she set her foot under it; she was behind on the platform, like this; she put her foot under it, pulled it out, and walked away; never said a word to me."

At another point he said that he first observed appellant "As she pulled her foot out from under this suit case and stepped in the car." This is all the evidence

in the case showing how the injury complained of occurred.

The case was submitted to the jury under proper instructions, and there is no complaint as to these. The sole point raised by appellant, as above stated, is that the verdict is contrary to the evidence.

Counsel relies upon six cases, and we think these cases support the conclusion we have reached, viz.: that the judgment should be affirmed, because it is well settled in this state, and we have written it in a number of cases, that the court will not reverse a verdict of the jury merely because it might be against the weight of the evidence; it must be more; it must be clearly and palpably against the evidence, or, as otherwise expressed, "flagrantly against the evidence." This is the rule laid down in the first case relied upon by appellant, viz.: *Adams Express Co. v. Tucker*, 161 Ky. 741. The court in that case reversed the lower court on the ground that the verdict was clearly and palpably against the weight of the evidence, because, as against the practically unsupported testimony of Tucker that the package he shipped contained diamonds, Mr. Elwood Hamilton testified that in a conversation with Tucker at about the time he was supposed to have shipped the diamonds Tucker stated he had pawned them and could get them if sufficient money was forthcoming. And three prominent attorneys of the Frankfort bar testified that Tucker's character for truthfulness was bad.

Furthermore the consignee testified that when the package was opened the diamonds were not in it, and the agent of the company testified that the package was sealed in Tucker's presence, so it is manifest that the court was clearly right in reversing this judgment.

In the other cases cited, viz.: *Thompson v. Thompson*, 93 Ky. 453; *Urso v. Unverzagt*, 2 Rep. 228; *McClain v. Esham*, 17 B. M. 146; *L. & N. R. Co. v. Graves*, 78 Ky. 74, the same rule is stated, and in each of these reversal was denied because there was evidence to support the verdict. *Bell v. Keach*, 80 Ky. 42, is not in point.

Applying this principle of law to the case before us we are of the opinion that the evidence here is sufficient to support the verdict. The flagman denied that he either threw or pitched the suit case on the car platform; he explained exactly what he did, and how the case was placed

there. The jury heard the evidence; they did not believe the theory advanced by the appellant and her witnesses. It is not for this court to say that in so doing they erred. The jury having concluded from the defendant's evidence that it was not negligent, we are powerless to set aside a judgment entered pursuant to their verdict. It is the province of the jury, not the court, to weigh the evidence.

The judgment is affirmed.

Scott, et al. v. Scott, et al.

(Decided March 14, 1919.)

Appeal from Pike Circuit Court.

1. **Waste—Action by Remaindermen Against Purchaser From Life Tenant—Evidence—Sufficiency.**—In an action by remaindermen against a purchaser from the life tenant to recover for timber cut and removed, a judgment for \$200 held erroneous, since the evidence authorized a finding of only \$137.13.
2. **Vendor and Purchaser—Breach of Warranty—Vendor's Liability for Counsel Fees and Cost.**—In an action by remaindermen to correct the record of a deed, and to quiet their title to the remainder interest in the land against a purchaser from the life tenant, by deed containing a covenant of general warranty, and purporting to convey the entire title, the defendant was entitled to recover on the warranty the full amount of the cost and attorneys' fees incurred in defense of his title, where the correction of the record was a necessary step in order that plaintiffs' title to the remainder interest in the land might be quieted.
3. **Estoppel—Vendor and Purchaser—Breach of Warranty—Arbitration and Award—Abandonment.**—A purchaser of land is not estopped to rely on a covenant of warranty by an agreement to arbitrate, where the agreement was never carried out but was abandoned.
4. **Trusts—Trustees Ex Maleficio—Equitable Liens.**—Where vendors not only conveyed land by deed containing a covenant of general warranty, and purporting to convey the entire title, but also fraudulently represented that they were the owners of the entire title, and it subsequently developed that they were the owners of only a life estate in the property, they became trustees for the purchaser of that portion of the purchase money for which there was no consideration, and the trust attached to land bought with such purchase money, and entitled the purchaser to an equitable lien thereon.
5. **Life Estates—Improvements—Charge on Remainderman.**—A life tenant, even though he may believe in good faith that he is the owner of the fee, is not entitled to a lien as against the remain-

derman, for the enhancement of the property by reason of his improvements, and the purchaser from the life tenant, though honestly believing that he acquired the fee, is entitled to no greater rights than the life tenant himself.

CHILDERS & CHILDERS for appellants.

ROSCOE VANOVER and WILLIS STATON for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing upon appeal and affirming upon cross-appeal.

This is the second appeal of this case. The opinion on the former appeal may be found under the title of Scott v. Scott, 172 Ky. 658, 190 S. W. 143.

On November 30, 1891, Crit Scott conveyed a tract of land in Pike county to his wife, Pricy Scott, and her bodily heirs by Crit Scott. On January 20, 1902, Pricy Scott and Crit Scott conveyed the same land to John W. Scott and wife by deed containing a covenant of general warranty, and purporting to convey the fee simple title. Thereafter, Daisy Scott and others, children of Pricy Scott and Crit Scott, brought suit against John W. Scott and wife to correct the record of the deed of November 30, 1891, from Crit Scott to his wife, and to quiet their title to their remainder interest in the land. On the hearing below, the petition was dismissed, but on appeal it was held that the plaintiffs were entitled to have the record of the deed corrected and their title to the remainder interest quieted. At the same time, the court declined to pass on the liability of Pricy Scott and Crit Scott under their covenant of warranty, or on the question of waste and improvements, but remanded the case with directions to the chancellor to consider and pass on these questions after the parties had been given an opportunity to take further proof if they desired. On the return of the case, further evidence was heard as to the amount of timber cut and removed by John W. Scott and wife. On final hearing, plaintiffs were given judgment against the defendants, John W. Scott and wife, for the sum of \$200.00 for timber cut and converted to their own use. John W. Scott and wife were given judgment against Crit Scott for the sum of \$175.00 for costs and attorneys' fees incurred in defending the title conveyed to them by Crit Scott and Pricy Scott. It was further adjudged that Pricy Scott's life interest in the \$1,000.00, paid as consideration for the land in contro-

versy, was worth \$702.50, and for the balance of \$297.50, with 6% interest thereon from January 20, 1902, until paid, John W. Scott and wife were given judgment against Crit Scott and were awarded a lien therefor on the land purchased by Crit Scott with the purchase money and conveyed to Pricy Scott. The claim of John W. Scott and wife for improvements was disallowed. From that part of the judgment, denying their claim for improvements and adjudging plaintiffs a recovery of \$200.00 for timber cut, and awarding them only the sums of \$297.50 and \$175.00 for breach of warranty, John W. Scott and wife appeal. From that portion of the judgment awarding John W. Scott and wife the sum of \$297.50 and a lien on the land of Pricy Scott, Crit Scott and Pricy Scott prosecute a cross-appeal.

The only evidence as to the amount of timber cut and removed by John W. Scott and wife is that prior to the suit he cut 42 trees, of the value of \$1.00 per tree, and that after the suit was brought he cut 47,565 feet of lumber, worth \$2.00 per thousand in the tree, or the sum of \$95.13. Under this proof, plaintiffs were entitled to recover \$42.00 plus \$95.13, or the sum of \$137.13 and no more, and it was error to render judgment in their favor for \$200.00.

John W. Scott testified that the costs and counsel fees, incurred in defending the title, amounted to \$209.00, and there is no evidence to the contrary. The chancellor seems to have proceeded on the theory, that as a portion of this cost was incurred in resisting the correction of the deed, Crit Scott should not be held liable on his warranty for that, and therefore gave judgment for only \$175.00. As a matter of fact, however, the correction of the record of the deed was a necessary step in order that plaintiffs' title to the remainder interest in the land might be quieted. That being true, the whole expense was incurred in defense of the title, and John W. Scott and wife are entitled to recover on the warranty of Crit Scott and wife the amount so expended, or the sum of \$209.00.

But it is suggested that there should be no recovery on the warranty since John W. Scott and wife are estopped to insist on the warranty, because they and their grantors agreed to rescind the trade and submit the matter to arbitration. It does not appear, however, that the arbitration agreement was ever carried out. On the

contrary, it was abandoned. That being true, there is no ground for estoppel.

It is further insisted on the cross-appeal that John W. Scott and wife should not have been adjudged a lien on the tract of land purchased and conveyed to Pricy Scott for the \$297.50 and interest, or that portion of the purchase price of the tract in controversy for which they received no consideration. In Pomeroy's Eq. Jur., sec. 155, the author says, citing many cases: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." And again, in section 1053: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influences, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquire a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." And citing the foregoing principles, the United States Supreme Court, in the case of *Angle v. Chicago, St. Paul, M. & O. R. Co.*, 151 U. S. 1, 38 L. Ed. 55, laid down the rule that whenever the legal title to property has been obtained through actual fraud, equity impresses a constructive trust upon the property thus acquired, in favor of one

who is truly and equitably entitled thereto. Here, the grantors, Crit Scott and Pricy Scott, not only conveyed the land purchased by John W. Scott and wife by deed containing a covenant of general warranty, and purporting to convey the entire title, but they fraudulently represented that they were the owners of the entire title. Furthermore, the evidence leaves no doubt that the purchase money which they received was invested in the tract of land conveyed to Pricy Scott. That being true, they obtained by actual fraud that portion of the purchase money for which there was no consideration. To that extent, they became trustees of John W. Scott and wife, and the trust attached to the land purchased with the money, thus entitling John W. Scott and wife to an equitable lien thereon.

There is no basis for awarding John W. Scott and wife a lien on the land in controversy for the improvements to the extent that they enhanced the vendible value of the land. It is the well established rule in this state that a life tenant, even though he may believe in good faith that he is the owner of the fee, is not entitled to a lien as against the remaindermen, for the enhancement of the property by reason of his improvements, and a purchaser from the life tenant, though honestly believing that he acquired the fee, is entitled to no greater rights than the life tenant himself. *Wilson v. Hamilton, et al.*, 140 Ky. 327, 131 S. W. 32; *Gray v. Soden*, 120 Ky. 277, 86 S. W. 515; *Frederick v. Frederick's Admr.*, 102 S. W. 858, 13 L. R. A. (N. S.) 514.

On the cross-appeal the judgment is affirmed. On the original appeal the judgment is reversed, with directions to enter judgment in conformity with this opinion.

Donahue v. Louisville, Henderson & St. Louis Railway Company.

(Decided March 18, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, First Division).

1. **Master and Servant—Assumption of Risk.**—A trackman working for an interstate railroad and engaged in interstate commerce, who is injured by flying slivers of steel which come from a common chisel or clawbar, though defective, with which he is

working, assumes the risk of danger therefrom, and is not entitled to damages, although the suit be prosecuted under the Federal Employers' Liability Act.

2. Master and Servant—Simple Tool Rule.—A spikemaul, T rail, chisel and clawbar are common tools governed by the simple tool rule, as announced by this court.
3. Master and Servant—Defective Appliances—Assumption of Risk.—One who uses without complaint or an assurance of safety from the master, defective common tools with which he is injured, assumes the risk of danger from such defective common tools, and the company may successfully interpose the plea of assumed risk; such conduct is not contributory negligence on the part of the employe but assumed risk and is only a defense in cases where the Federal Safety Appliance Act does not cover the tool or instrumentality causing the injury.
4. Master and Servant—Assumption of Risk—Contributory Negligence.—Contributory negligence is not a complete defense to an action for personal injury or death of an employe under the Federal Employers' Liability Act, but can be received only to reduce the recovery. Assumed risk is a complete bar to an action in cases where it can be invoked.

ELMER C. UNDERWOOD for appellant.

HELM & HELM for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

The Louisville, Henderson & St. L. Ry. Co., operates an interstate railroad, and was at the times complained of and is now engaged in interstate commerce. Appellant Jerry Donahue was employed by said railway company as one of a crew of trackmen engaged in maintaining the tracks in the Louisville yards of said company. On September 21, 1916, appellant Donahue and a colored man named Logsdon were directed by the foreman of the gang to take a spike maul and a chisel T rail cutter and go to a certain pile of T rails in the yards of the company and there cut an ordinary steel railroad rail into two parts. This work was accomplished by placing the chisel on the steel rail at the point where it was marked to be cut, and then by striking the chisel with the maul. The colored man held the chisel on the rail while appellant Donahue struck the top of the chisel with the spike maul. The chisel was an old one that had been long in use and the top or head of it had been battered and "mushroomed" by heavy strokes from the spike maul. The spike maul likewise was old and battered. In the course of the work a sliver or

steel splinter flew from the head of the chisel and struck appellee Donahue in the left eye, inflicting a more or less painful injury and impairing the sight of the eye in part. From this injury Donahue lost only a few days' work.

About a month later Donahue with his gang was engaged in repairing a switch in one of the yards. The foreman directed Donahue to take the clawbar, a steel bar about four or five feet long with a claw on one end so arranged as to pull spikes from cross-ties, and place the claw thereof over the head of a steel spike which had been driven into the bolt hole of the rail and splice, in order to drift the rail into position, and hold the bar in such position as to allow a fellow workman to strike the heel thereof with the spike maul and thus drive the spike from the hole in the steel rail. While appellant Donahue was thus holding the clawbar and the fellow workman was striking the heel as aforesaid, a sliver of steel flew from the heel of the clawbar and struck appellant in the right eye, destroying the sight thereof. On the 18th day of January, 1917, Donahue instituted this action in the Jefferson circuit court under the Federal Employers' Liability Act, in two paragraphs, seeking to recover of appellee railway company damages for each of said injuries.

After a general demurrer to the petition had been overruled and other preliminary motions passed upon, defendant filed an answer traversing the allegations of the petition and in the second paragraph averred that plaintiff Donahue was guilty of such contributory negligence as would bar his right of recovery. By the third paragraph the answer alleged that plaintiff Donahue "in entering and remaining in the service of the defendant assumed certain risks and dangers incident to his work and by his contract of service with the defendant he assumed all the ordinary risks and dangers incident to his employment, among which was the risk of injury set up in the petition." The affirmative allegations of the answer were controverted by reply.

The case came on for trial before a jury and at the conclusion of plaintiff's evidence, counsel for defendant company moved the court to peremptorily instruct the jury to find and return a verdict for it, which motion was sustained by the court, and plaintiff's action dismissed, and of this he complains upon this appeal.

The railroad company is an interstate common carrier and was engaged in interstate commerce at the time of the two injuries of which Donahue complains, and Donahue is admitted to have been in its employ at each of said times, and it may be conceded was engaged in interstate commerce. Appellee company insists that the clawbar, chisel and spikemaul employed by appellant Donahue and his fellow workman at the time of which he complains of injury, are common tools governed by what is generally known as the "simple tool" rule, and that the master did not owe to Donahue the duty of inspecting the tools for defects, but that such duty rested upon Donahue as the workman having the tools in charge. To this contention appellant Donahue responded by conceding the tools employed to come within the rule stated, but asserts the most that could be said against appellant is that he was guilty of contributory negligence in continuing to use the tools which he knew to be in a defective condition, and that by the Federal act under which this suit is prosecuted, contributory negligence is not a bar but may be pleaded in mitigation of damages only, and the trial court erred to appellant's prejudice in sustaining the motion for peremptory instruction. Appellee company does not accede to this insistence and attempts to avoid it by saying that the act of appellant Donahue in continuing to use the tools after he knew of their defective condition is not properly classified as contributory negligence, but was an assumption of risk on his part, the tools not being within the Federal Appliance Act, is conclusive of his right to recover.

Appellant Donahue admits that he was thoroughly acquainted with the tools with which he was working at the time of the two accidents. He had been engaged as a track man for about 15 years, 9 years of which had been spent in the yards of the appellee company where the injuries occurred. During that nine years he had used many different chisels similar to the one employed at the time of the first accident. The clawbar with which he was working at the time of the second accident, he testifies, had been on the job and he had been using it for nine years. He admits that he knew of its battered condition; that he had seen it hammered in the same manner with the spike maul before the occasion in question, and that the heel of the claw was battered and bruised so as to be quite visible.

A photograph of the clawbar and the heel thereof is made a part of the evidence. Donahue also admits that there were some twelve or thirteen chisels in the tool box at the time he and his co-laborer selected the maul and chisel with which to do the cutting on September 21, and that all of said chisels were about alike; the top or head of each was spread and battered by long use. The defective condition of the tools was open and obvious; the defects were as apparent to Donahue as to any one and the nature of the tools was so simple and uninvolved as to be understood by any one with ordinary vision and mentality. Donahue had a better opportunity to see and know the condition of the tools with which he worked than did the foreman or master.

Under facts similar to those in this case, this court has repeatedly held that the simple tool rule which exempts the master from liability where the instrument or tool which is the cause of the injury is of so simple a nature and character that a person accustomed to its use can not fail to appreciate the risks of danger incident thereto, is applicable.

In the case of *Ohio Valley Railway Company v. Copley*, 159 Ky. 38, it was held that where one was injured through a defect in a chisel similar to the one in question in the case at bar, the master was not liable to the injured servant because the tool in question was of a "simple nature, easily understood and in which defects can be readily observed by such servant."

The simple tool rule was first recognized by this court in the case of *Sterling Coal & Coke Co. v. Fork*, 141 Ky. 41, where a laborer who was working with a common shovel, sustained injuries from a defect in the handle, was denied recovery.

A case very similar to the one at bar is *Hoskins v. L. & N. R. R. Co.*, reported in 167 Ky. 665, where it was held that a clawbar and spike maul, similar to the ones in question in the case under consideration, were simple or common tools which any one of ordinary intelligence may safely use without instruction or assistance, and the duty of inspection as to such tools rests upon the laborer using them and not upon the master. To the same effect are the following Kentucky cases: *C. N. O. & T. P. Ry. Co. v. Guinn*, 163 Ky. 158; *Ohio Valley Ry. Co. v. Copley*, *supra*.

The simple tool doctrine has been acknowledged and applied in most, if not all, of the states of the Union. Some of the more recent cases are the following: *Arnold v. Doniphon Lmr. Co.*, 130 Ark. 486. *Wrought Iron Range Co. v. Zeitz* (Col.) 170 Pac., 181; *Nosal v. International Harvester Co.*, 187 Ill. App., 411; *Morrison v. Peoples Gas, Light and Coke Co.*, 191 Ill. App. 335; *Wiggins v. Standard Oil Co.*, 141 La. 532; *Cooney v. Portland Terminal Co.*, 112 Me. 329; *Cornar v. Minneapolis, St. Paul & S. R. R. Co.* (Minn.), 166 N. W., 1072; *Southern Ry. Co. v. Hensley*, 138 Tenn. 408; *Southern Ry. Co. v. Buford*, 120 Va. 157; *Panhandle, &c. Ry. Co. v. Fitts* (Tex.), 188 S. W. 528; *Haire v. Schaff* (Mo. App.), 190 S. W. 56; *Ft. Smith, &c. v. Holcombe* (Okla.), 158 Pac. 633.

In the case of *Southern Railway Company v. Buford*, *supra*, the facts are almost identical with those surrounding the first injury of which Donahue complains, except stronger for him in that the injured workman was not using the hammer or chisel in cutting the rail but was holding the rail when the sliver of steel from the chisel struck and injured him. He was denied a recovery.

There is a distinction recognized by all the courts between assumed risk and contributory negligence, but this distinction fades when pursued to the point where the danger to the servant becomes open and obvious, for there he may in some cases be said to be guilty of contributory negligence if he proceeds with the work, or in other instances to have assumed the risks of danger. The distinction, however, is important in cases tried under the Federal Employers' Liability Act, as is admirably set forth in the case of *C. & O. Ry. Co. v. DeAtley*, 159 Ky. 687, which was appealed to the Supreme Court of the United States, and while reversed, the principle is recognized and discussed. See *C. & O. v. DeAtley*, 211 U. S. 309; *L. & N. R. R. Co. v. Patrick* *supra*; *Rase v. Minneapolis, &c., Ry. Co.* (Minn.), 21 L. R. A. (N. S.) 138; *Wiley v. C. N. O. & T. P. Ry. Co.*, 161 Ky. 305; *Lexington Railway Co. v. Cropper*, 142 Ky. 39.

Appellant asserts that the employment by Donahue of the defective chisel, spike maul and clawbar amounts to contributory negligence only on his part, and not to an assumption of risk, but this is not borne out by the authorities. In the case of *L. & N. Ry. Co. v. Patrick*, *supra*, it was expressly held that in an action to recover

for injury received while working as a section hand by slivers or spraws flying from the spike maul used by another section hand and furnished by the company, the injured servant was not entitled to damages if he knew of the defective condition of the spike maul and the danger of flying slivers therefrom, and continued to work in close proximity to the defective instrumentality without obtaining from the defendant or its foreman an assurance that the defect would be remedied or the danger removed, for the reason that his continuance at such work was an assumption of the risk thereby entailed. That was a case under the Federal Employers' Liability Act, and it was held that the negligence of the company in supplying a defective spike maul did not amount to a violation of the Federal statute enacted for the safety of the employe, commonly called the "Safety Appliance Act." In cases like this where the defective instrumentality does not come within the Federal Safety Appliance Act for the safety of employes, assumed risk may be interposed as a defense, but not so where the instrumentality complained of comes within the provisions of that act. In other words the defense of assumed risk was abrogated by the Federal act of 1908, where the injury resulted in whole or in part through a defective instrumentality employed by the company in violation of the Federal Safety Appliance Act, but where the instrumentality was a simple or common tool, which was not embraced within said act, assumed risk is allowed as a defense. *Seaboard Air Line v. Horton*, 321 U. S., 492; *Southern Ry. Co. v. Gadd*, 233 U. S. 572; *Glenn v. C. N. O. & T. P. Ry. Co.*, 157 Ky. 553; *Enos Admx. v. Kentucky Distilleries & Warehouse*, 163 Ky. 558; *Nashville C. & St. L. R. Co. v. Henry*, 158 Ky. 88.

To avoid the application of the simple tool rule as above stated, appellant Donahue asserts that the work which he was doing at the time of his second injury was directly under the eye, direction and supervision of the foreman, but he admits that the injury which came to him on September 21, was not so received. He relies upon the opinion in the case of *C. N. O. & T. P. Ry. Co. v. Quinn*, 163 Ky. 157, where an employe injured by flying slivers of steel was allowed to recover notwithstanding the simple tool rule, because the work was being done by the foreman and the injured servant, the

foreman doing the striking which caused the sliver to fly. There the injured laborer was inexperienced and did not know the dangers from the defective and battered hammer or anvil. In the case at bar Donahue admits that he was thoroughly acquainted with the fact that slivers would fly from a battered chisel, clawbar or spike maul, and with the further fact that the tools with which he worked were obviously defective. In the Quinn case the master was handling the tool from which the sliver flew and injured Quinn, and the opinion in that case is rested upon the principle that a servant will not be barred of recovery where the injury results from a defective simple tool in the hands of another, but only in cases where the injury results from his own use or employment of the simple tool. In this case Donahue was holding and using the defective instrumentality from which the sliver flew and struck his right eye in October, and the exceptions to the rule do not therefore apply.

It follows, therefore, that as Donahue was injured through the employment of defective tools which were not within the prohibition of the Federal Safety Appliance Act, and knew of the defective condition of the tools at the time and before his injury, his continuance to use them was an assumption of the risk of danger incident to the employment of such defective tools, and the railroad company had a right to rely upon his assumption of risk as a defense and the trial court properly sustained its motion for a directed verdict at the conclusion of the evidence of plaintiff, which evidence clearly establishes the facts which bring appellant within the rule above announced.

Judgment affirmed.

**Crook v. Cincinnati, New Orleans & Texas Pacific
Railway Company.**

(Decided March 18, 1919.)

Appeal from Grant Circuit Court.

1. **Master and Servant—Safe Place to Work—Assumption of Risk.**—While it is the duty of the master to use ordinary care to provide his servant with a reasonably safe place to work and reason-

ably safe appliances for performing the work, he does not insure the servant's safety and is not liable for an injury sustained by him from a defect in the appliance furnished him for doing the work, or that may result from the danger attending its performance, if such defect or danger is so obvious that it must have been known to a person of ordinary intelligence situated as was the servant. In such state of case the servant assumes the ordinary risks that attend the use of the appliance or performance of the work.

2. Master and Servant—Assumption of Risk.—It is a well known rule that a servant assumes the risks created by the method he voluntarily employs in performing the work required of him. As in this case the servant, a section hand, sustained the loss of a finger, while riding upon a railroad tricycle in performing a required duty, by attempting to manipulate a lever for stopping the tricycle, without looking to see where he was placing his hand, and thereby caused it to come in contact with the cogwheels of the machine; and the danger from such contact was so open and obvious as to have been known to him, the trial court was authorized to hold as a matter of law that his injuries were caused by his own negligence and on that ground to direct the jury to return a verdict for the appellee.
3. Master and Servant—Negligence—Pleading.—Where in an action for personal injuries the petition specifies the act or acts of negligence alleged to have caused the injuries, the plaintiff cannot on the trial of his case avail himself of any other act or acts of negligence, but is confined to the specifications of the petition. So in this case after alleging in the petition that his injuries were caused by the negligence of appellee in failing to provide a cover or guard for the cogwheels of the tricycle, appellant could not shift the ground of recovery by attempting to prove that appellee was negligent in permitting the use of a piece of wood near the cogwheels of the tricycle and failing to provide it with a cover or guard, and that his hand was injured by contact with it.

B. G. MENEFFEE and J. J. BLACKBURN for appellant.

A. G. DEJARNETT and F. A. HARRISON for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

On the trial of this action, whereby the appellant, Sidney Crook, was seeking the recovery of damages for injuries to his right hand resulting in the loss of the third finger and the bruising of another, caused, as alleged, by the negligence of the appellee, Cincinnati, New Orleans & Texas Pacific Railway Company, at the conclusion of the appellant's evidence the circuit court,

on appellee's motion, peremptorily instructed the jury to return a verdict for the latter, which was done and judgment accordingly entered. The appellant thereupon filed a motion and grounds for a new trial, which motion the court overruled, and he has appealed. The negligence complained of was the alleged failure of appellee, through its section boss, to provide appellant with a tricycle reasonably safe for use in the performance of the duty required of him, the averments of the petition setting forth the negligence being as follows:

"In attempting to take hold of the lever of the brake to stop said tricycle, his right hand was caught in said cogwheels, thereby crushing, breaking and severing the third finger of the plaintiff's right hand; and that defendant negligently failed to have said cogwheels covered or guarded and they were dangerous to persons operating said tricycle when uncovered or unguarded."

The petition then proceeds to allege that he was inexperienced in operating tricycles; that the danger from the cogwheels was at the time unknown to him but was known to the defendant; and that he was not advised by the section boss of the danger to be apprehended from the cogwheels in operating the machine.

It appears from the bill of evidence that appellant was in appellee's employ as a section hand or track repairer and had served it in that capacity for twenty years. On the day his injuries were received he and two other servants of appellee, all under the supervision of the section boss, were at their customary work of track repairing about three miles north of Mason, using at the time a motor truck, the engine of which, for some reason, failed to longer propel it, thereby rendering it necessary to push the car by hand to a nearby crossing to get it off the track out of the way of expected trains; and to protect the employes pushing the motor car from coming trains appellant was directed by the section boss to get upon the tricycle, keep in the rear of the motor car and watch the electric signal block north of him for a signal of the coming of a train. He got upon the tricycle as directed and proceeded to follow after the men pushing the motor truck, keeping such attention as he could upon the signal block behind him for a signal of the coming of a train, in doing which he discovered that he was about to run the tricycle into the

men in charge of the truck and in attempting to stop the tricycle in time to prevent such a collision reached for the lever provided for stopping it, when his hand came in contact with something that caught the finger, crushed it and otherwise injured the hand.

The only evidence introduced as to the manner in which the accident occurred was furnished by the testimony of the appellant. There were two physicians introduced as witnesses in his behalf, but the only evidence elicited from them was as to the nature and extent of his injuries. While the testimony of appellant was to the effect that he had never previously operated the tricycle in question, it and others like it had, as he admitted, been almost daily used by the section boss and his gang during the many years of appellant's connection with them. He did not testify that he had not during his long service with appellee operated another or other tricycles like the one by which he was injured; nor was he able to point out wherein the mechanism of the latter differed from that of other tricycles with which he was familiar or that had been used by the section gangs with which he had been connected while in appellee's employ. In brief, we think it fairly apparent from the appellant's own testimony that the tricycle was constructed in the customary manner; that it was not out of repair in any of its parts; that there was no exposure of its cogwheels that is not common to all such machines, or that can be remedied by a cover or guard, and that the danger from contact of the hand of the operator with the cogwheels, was and is so open and obvious as to be readily seen and understood by a person of ordinary intelligence while engaged in operating the tricycle.

Notwithstanding his duty to keep a lookout for the coming of a train appellant was not expected, nor was there in the instructions given him by the section boss, any command that required him in watching the signal block for a signal of the coming of a train, to neglect the taking of such precautions for his own safety as would be expected of an ordinarily prudent person under like or similar circumstances. Obviously, he was not required or expected to reach for and attempt to manipulate the lever for stopping the tricycle while looking at the signal block, and if he did so with the knowledge he must have had of the open and visible prox-

imity of the cogwheels to the lever and of the danger of coming in contact with them, he undertook to use the lever for stopping the tricycle without looking to see where he was placing his hand and by reason thereof it came in contact with the cogwheels and thereby caused his injuries, it would seem to follow that they resulted from his own negligence and, if so, he was not entitled to recover damages of the appellee. It should be kept in mind that a train did not in fact come upon appellant or his fellow servants while the latter were removing the motor car from the track, therefore, there was no emergency that prevented the exercise of ordinary care on his part for his safety. There was no claim that the section boss gave appellant any assurance that his performance of the duty required of him could be done in safety, nor did the latter object to its performance or advise the section boss of any want of experience that might make it unsafe for him to operate the tricycle, and there was no evidence whatever tending to show that the section boss had any reason to suppose appellant incapable of operating it. While it is the duty of the master to provide his servant with a reasonably safe place to work and reasonably safe appliances for doing the work, he does not insure the safety of the servant and is not liable in damages for an injury sustained by him from defects in the appliances furnished him with which to do the work, or that may result from the danger attending its performance, if such defect or danger is so obvious that it must have been known to a person of ordinary intelligence situated as was the servant. But there was no defect in the tricycle operated by appellant; there was no way by which a guard could have been placed about the cogwheels and the only danger that could arise from them to the operator of the machine was so plainly visible as to be easily avoided by the exercise of ordinary care on his part. If, therefore, appellant's injuries resulted from the negligent means employed by him to stop the tricycle, he was not entitled to recover, for it is a well known rule that a servant assumes the risks created by the method he employs in performing the work. *L. H. & St. L. Ry. Co. v. Wright*, 170 Ky. 230; *Fluhart Collieries Co. v. Meeks*, 160 Ky. 127; *Hassett & Co. v. Richardson*, 169 Ky. 342; *Jarboe's Admr. v. Coleman*, 168 Ky. 707; *North Jellico Coal Co. v. Disney*, 161 Ky.

605. As, according to the evidence, appellant's injuries were caused by his own negligence in attempting to manipulate the lever for stopping the tricycle without looking to see where he was placing his hand, the verdict for the appellee was properly directed by the trial court.

But if the proof of appellant's own negligence had been less convincing, the action of the court in directing a verdict for the appellee was authorized on the ground that appellant failed to prove that his injuries resulted from the negligence of appellee alleged in the petition. As previously stated, the act of negligence charged was the failure of appellee to have the cogwheel covered or guarded. In giving his testimony appellant admitted that in attempting to grab the lever or brake to stop the car he missed it, "and something caught that finger." When asked what caught his finger he answered: "Well, I don't know whether it really was the cogs or whether it was the wooden piece about that long that works right along at the side of the car; it works backwards and forwards." When asked later in his examination to again tell the jury about his injuries he answered: "Well, I threw that hand down to catch the brake, why, there was something caught that finger; of course I didn't see what it was, but I thought at the time it was the cogwheels. But after I again looked at that car, that little wooden piece could catch a fellow's fingers and cut them off, and I don't know whether it was the wooden piece or the brake; I don't know which it was, but, anyhow, there was something that caught my finger and cut it off." His testimony throughout manifests his ignorance of the manner of receiving his injuries, further than that his finger was caught either by the cogwheels or a piece of wood, which in some way, unexplained, formed a part of the tricycle and was put in motion by its movements. The petition makes no mention of this piece of wood or complaint that its presence added in any way to the danger of operating the tricycle; nor is it therein alleged that the failure of appellee to cover or guard the wooden piece constituted negligence. Yet according to the evidence, the injuries of appellant may as reasonably be attributed to this appliance as to the cogwheels. Where in a suit for personal injuries, the plaintiff specifies the act or acts of which the alleged negligence con-

sists, he cannot, upon the trial, avail himself of any other acts of negligence, but is confined to the specifications of his petition. *Burch v. Louisville Car Wheel & Ry. Supply Co.*, 146 Ky. 272; *Lexington Railway Co. v. Britton*, 130 Ky. 676; *Moreland's Admr. v. Indian Refining Co.*, 146 Ky. 760; *W. A. Gaines & Co. v. Johnson*, 133 Ky. 507; *Rowe v. L. & N. R. R. Co.*, 143 Ky. 826.

So in this case, after alleging in the petition the failure of appellee to provide a cover or guard for the cogwheels of the tricycle as the act of negligence causing his injuries, appellant could not shift the ground of recovery by proving that his injuries were also caused by the negligence of appellee in permitting the use of the piece of wood on the tricycle or in failing to cover it. We do not overlook the fact that appellant, at the conclusion of the evidence, offered to file an amended petition containing such averments as he thought would entitle him to rely upon the ground last mentioned for a recovery, but the trial court properly refused to allow the amendment to be filed, as its allegations did not conform to the proof, for there was no proof authorizing a recovery upon any such ground. The presence of the piece of wood as a part of the machine, as well as whatever danger was to be apprehended from the contact of appellant's hand with it, was just as open and obvious to him in using the machine as were the presence of the cog wheels and danger from like contact with them. Indeed, viewed with an understanding of the evidence, the new matter contained in the amended petition amounted to little more than a confession on the part of appellant that he was without actual knowledge as to the manner of receiving his injuries. It is a well known rule of law that where, on the plaintiff's own evidence, it is as probable that the injury sued for was not due to defendant's negligence as that it was due to such negligence, plaintiff cannot recover. *L. & N. R. R. Co. v. Guest, Admr.*, 32 R. 670, 106 S. W. 817; *L. H. & St. L. Ry. Co. v. Golly's Admx.*, 28 R. 989, 90 S. W. 977.

As the record discloses no cause for disturbing the verdict directed by the trial court, the judgment is affirmed.

Hayes v. West Virginia Oil, Gas & By-Products Company.

(Decided March 18, 1919.)

Appeal from Lawrence Circuit Court.

1. Corporations—Designation of Agent Upon Whom Process May be Served.—A corporation which has failed to comply with the requirements of section 571, Ky. Stats., can not, lawfully, do business in the state of Kentucky, and can not maintain a suit for the protection of a business which is being conducted contrary to law.
2. Corporations—Designation of Agent Upon Whom Process May be Served.—A corporation which does business, in this state, without complying with section 571, Ky. Stats., can not make its acts before complying with the statute, valid, by a compliance with it thereafter.

CLYDE L. MILLER for appellant.

W. D. O'NEAL for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

The appellant, Wilson Hayes, is the owner of a tract of land, in Lawrence county. On August 3, 1915, he executed and delivered to A. J. Dalton, trustee, a lease upon his lands, by which he conveyed to the grantee, the oil and gas, under the surface of the lands, and the right to enter thereon, and bore for, and remove same, etc. Thereafter, A. J. Dalton, trustee, sold and assigned the benefits and rights, under the lease, to the appellee, West Virginia Oil, Gas & By-Products Company. Under this lease, the appellee, entered upon the lands and bored for oil successfully, but in the meantime, a controversy had arisen between appellant, Hayes, and the heirs of Rice, Hatcher and Rice, as to the ownership of the oil, etc., in the lands, and this controversy resulted in a suit, at law, between Hayes and the Rice, Hatcher, and Rice heirs, and in a judgment of the court, by which it was decided, that the latter, were the owners of the oil, and minerals in the lands, with the exception of coal. Thereupon, the heirs of Rice, Hatcher and Rice executed a lease to A. J. Dalton, trustee, by which, they conveyed, to him, all their rights to the oil, and minerals in the lands, and he assigned the benefits, of his conveyance, to the appellee. Thereafter, the appellant and appellee engaged in a controversy, as to their re-

spective rights in the premises, which resulted in appellant interfering with the appellee, in its use of the land, and the exercise of certain privileges, thereon, which it claimed under its lease. The appellee brought an equitable action to restrain appellant from interfering with, and obstructing it, in its operations, and obtained a temporary restraining order, and as final judgment in the action an order, permanently enjoining the appellant, from the acts complained of, and from this judgment he has appealed.

One of the defenses, offered by appellant, was, that the appellee was a corporation and had never complied with the requirements of section 571 Ky. Stats., by "filing, in the office of the Secretary of State, a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served." For the purpose of a trial of the action, the parties, then made and subscribed an agreement as to the facts touching their controversy, and therein, it was agreed, that the appellee was the assignee of Dalton, trustee, of the lease executed by appellant, to him, and, also, of the lease executed by the heirs of Rice, Hatcher and Rice, and that these leases authorized the appellee to enter upon the lands, and to bore for oil, etc., and that prior to the institution of the action, the appellant interfered with appellee in its operations, and forbid it to enter upon the lands for the purposes of the operations. It was, also, agreed, that at the time, appellee acquired the leases, and at the time, the appellant committed the acts complained of, the appellee "was engaged in leasing, buying, owning and operating oil and gas properties in Lawrence county, Kentucky, and had failed to designate a process agent, it being a West Virginia corporation, but, after the filing of the amended answer herein, setting up such default, the appellee, did, on March 30th, 1917, designate a process agent as required by section 571, Ky. Stats." The appellee, by its brief, insists that the contract, by which it acquired the leases, was made and executed, wholly, in the state of West Virginia, wherein the corporation is domiciled, and that it acquired the leases by assignment from A. J. Dalton, trustee, who, as an individual, had acquired the leases, in Kentucky, and for that reason, the leases are not invalid, but, the stipula-

tion as to the facts, does not contain a statement to the above effect, and, neither does it contain any statement, as to where the contract was made and executed, by which the corporation acquired the leases, and for that reason, we do not decide nor make any intimation, as to the validity or invalidity of the leases, and neither is such question before us, upon the record, as the appellant only contests the right of the corporation to enforce rights, which it claims to have growing up out of the lease, or to complain in court of any infraction of any rights, which it might have under the leases, if it had complied with the statutory requirements. All the acts of appellant, which it complains of, were committed before it had complied with the statute, and at the time of the institution of its suit, it had not then complied with it. The statute, *supra*, very broadly declares, "that it shall not be lawful for any corporation to carry on any business in this state," until it shall have complied with the requirements of that statute, and it imposes a penalty upon a corporation, which "shall transact, carry on or conduct any business in this state," without a previous compliance with the requirements of the statute, thereby making such conduct upon its part, illegal. Hence, it is immaterial whether the leases are valid or invalid, as the corporation could not, lawfully, do any business with reference to them, nor enforce any right claimed by it under them, nor appeal to the courts of this state, to enforce an asserted right upon its part, to conduct a business, which the law forbids it to do. The reasons and purposes of the statute 571, *supra*, have been frequently declared, and a compliance with its provisions is neither onerous nor complex. Most of the states have a similar statute. The duty of enacting such a statute, was imposed upon the legislative department, by section 194 of the Constitution. The effect of the statute upon those corporations, which decline or neglect to comply with its provisions, has been, heretofore, declared by the decisions of this court, until it has become the settled law of the Commonwealth. *Oliver Company v. Louisville Realty Co.*, 156 Ky. 628; *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504; *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774. Nor would the fact that before the judgment, in the trial court, the appellee did comply with the requirements of the statute, in any way, affect its right to

maintain a suit, because of claimed interference with its business prior to that time, and to invoke the aid of the courts, in the carrying on a business, which it was expressly forbidden by statute to do. In *Fruin-Colnon Contracting Company v. Chatterson*, *supra*, it was held that a corporation, which had made a contract, prior to complying with section 571, *supra*, could not make that contract enforceable, by a compliance with the statute, thereafter. To hold, that a corporation could decline or neglect to comply with the statute, until it desired to invoke the aid of the courts, about something, and that its compliance then would have the effect of making its acts previous to that time, valid, and its claims enforceable, which it was theretofore, exercising unlawfully, would destroy the purpose of the statute, and any beneficial effect, which it was intended to have. In the instant case, all of the things complained of, were such as transpired previous to the bringing of the action, and to the compliance with the statute by the appellee. One cannot be heard to invoke the aid of the courts, in assisting it to carry on a business, which the law makes illegal and forbids one to do.

The judgment is therefore reversed and cause remanded with directions to set aside the judgment, granting the injunction, and for proceedings not inconsistent with this opinion.

Young, et al. v. Cumberland County Educational Society.

(Decided March 18, 1919.)

Appeal from Cumberland Circuit Court.

1. **Appeal and Error—Questions Reviewable—Cross-appeal.**—Where certain parties to an action prosecuted no cross-appeals from adverse judgments, on appeal by other parties, the errors could not be reviewed.
2. **Contracts—Building Contracts—Measure of Damages for Defective Work.**—Ordinarily the measure of damages for defective work under a building contract is the difference between the value of the building as constructed, and what its value would have been if it had been constructed according to the contract; but where the contractor wilfully varies from the contract by using materials not only different from those contracted for, but

wholly unsuitable for the purpose, the measure of damages is the actual cost of reconstructing the building according to the contract.

3. **Contracts—Building Contracts—Damages for Defective Work—Finding—Evidence—Sufficiency.**—Where, in an action on a building contract, the owner counterclaimed for damages for defective work, evidence examined and held insufficient to sustain the chancellor's finding that the building was worthless.

PRESCOTT SANDIDGE for appellants.

W. E. MILLER, CHARLES GRAYER, C. R. HICKS and J. O. EWING for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

The Cumberland County Educational Society, a corporation, was organized for the purpose of purchasing a site and erecting buildings thereon to be leased and used as an educational institution. To that end, it purchased eight acres of land in the town of Burkesville and entered into contracts with Charles Grayer to construct a school building for the sum of \$7,500.00, and with R. Young to build two frame dormitory buildings for the sum of \$5,940.00. After the execution of these contracts, R. Young and C. R. Payne entered into a partnership for the erection of the two dormitory buildings, and later on, Young, Payne and Grayer entered into a partnership for the construction of all the buildings. The grounds and buildings were leased to Payne. Upon the completion of the buildings, Payne moved to and proceeded to conduct the school for two or three years.

Grayer brought this suit against the Cumberland County Educational Society, R. Young and C. R. Payne, and sought a mechanic's lien for the sum of \$4,949.00, the balance due under the contract, and for the further sum of \$922.02, the amount due for extras. He charged that Young and Payne were in collusion with the Cumberland County Educational Society to prevent him from recovering what was due him, and that they would not unite as plaintiffs. Young and Payne filed a joint answer, counterclaim and cross-petition, denying collusion and asserting their claim and lien for certain balances due. The Cumberland County Educational Society filed an answer and counterclaim, denying the right of

Grayer, Young and Payne to recover, and pleading that it was damaged in a large sum because the brick building was practically worthless. Later on, it filed an amended answer charging a conspiracy between Young, Payne and Grayer to cheat and defraud it out of its money, and asked damages on this account in the sum of \$10,125.18. During the progress of the action, Grayer abandoned his original suit and asserted a claim against Young and Payne for 217 days' service at \$2.00 per day. On final hearing, the chancellor held that the brick school building was worthless; that there was due Grayer, Young and Payne, under the contracts, the sum of \$2,276.07, and also the sum of \$702.92 for extras, and rendered judgment on the Educational Society's counterclaim against Grayer, Young and Payne for the sum of \$7,500.00, less the sum of \$2,928.99. The society's claim for damages of \$10,125.18 on the ground of fraud was rejected, as was also Grayer's claim against Young and Payne. Young and Payne appeal.

No cross-appeal has been prosecuted either by the Educational Society or Grayer. Hence, that part of the judgment rejecting the society's claim for fraud and Grayer's labor claim against Young and Payne cannot be reviewed.

Besides other defects which could have been easily remedied, it was shown that a large number of the facing brick was soft instead of hard, and when exposed to the weather disintegrated and ran over the outside wall. Three or four of the directors of the Educational Society testified that, in their opinion, the brick building was worthless. None of them, however, had ever had any experience as contractors or builders and were unable to state whether or not the defective brick could have been removed and good brick substituted. Charles Grayer also stated that the building was in such condition that no one would want to take it. On the other hand, an experienced contractor, in answer to the hypothetical question whether the defective brick could have been removed and hard brick substituted, replied that this could be done at an expense of about \$30.00 per thousand for hard brick.

The brick building was accepted and used for the purpose for which it was constructed. Ordinarily, in a case like this, the measure of damages is the difference between the value of the building as constructed

and what its value would have been if it had been constructed according to the contract. *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.*, 121 S. W. 447; *Culbertson v. Ashland Cement Co.*, 144 Ky. 614, 139 S. W. 792; *Panke v. Fischer*, 48 S. W. 993; *Short v. Moore*, 43 S. W. 211. However, where the contractor willfully varies from the contract by using materials not only different from those contracted for, but wholly unsuitable for the purpose, the true measure of damages is the actual cost of reconstructing the building according to the contract, *Morgan v. Gamble*, 230 Pa. St. 165, 79 Atl. 410, and it seems to us that this is the measure of damages applicable to the peculiar facts of this case, since it appears that soft and unsuitable brick were used in the outside walls instead of hard brick as required by the contract. The judgment below was based on the finding that the building was worthless.

Manifestly, if the defective conditions could have been remedied, the building was not worthless. None of the witnesses for the society were able to say this could not be done. On the other hand, an experienced builder gave it as his opinion that the defective brick could have been removed and hard brick put in their stead at a reasonable expense. In our opinion, the evidence was not sufficient to sustain the chancellor's finding that the building was utterly worthless. In view, however, of the fact that the case was not fully developed with respect to the cost of remedying the defective conditions, the ends of justice require that the parties be given an opportunity to introduce further evidence on the question, and no final judgment will be directed.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Johnson, et al. v. Broughton.

(Decided March 18, 1919.)

Appeal from Bell Circuit Court.

1. **Frauds, Statute of—Interest in Lands—Standing Timber—Memorandum—Signature—Party to be Charged.—Under Kentucky Statutes, sec. 1409, subsection 13, no contract for the sale of standing timber is enforceable unless the contract, or some memorandum thereof, be in writing, signed by the person to be charged, or his**

duly authorized agent, and the person to be charged is the vendor.

2. **Frauds, Statute of—Interest in Lands—Standing Timber—Oral Contract to Purchase and Convey to Another.**—An oral contract to purchase land or standing timber and convey it to another is within the statute of frauds.
3. **Frauds, Statute of—Benefit of the Statute—Pleading.**—Where plaintiff pleads an oral contract within the statute of frauds, the defendant may obtain the benefit of the statute under a general denial of the contract.
4. **Appeal and Error—Findings—Conclusiveness.**—Where the evidence on a question is conflicting, and upon a consideration of the whole case the appellate court cannot say with reasonable certainty that the chancellor erred in his conclusion, his finding will not be disturbed.
5. **Logs and Logging—Contracts—Construction.**—Defendants purchased plaintiff's timber at the price of \$3.50 per thousand feet, with the right to remove it within five years. Needing money, plaintiff offered in writing to reduce the price 50c per thousand feet, and requested defendants to send him \$500.00. In reply, defendants enclosed a contract and wrote plaintiff that upon his signing the contract, they would pay him \$500.00 more on the timber. Thereupon, plaintiff and defendants entered into a written contract by which plaintiff agreed to accept \$3.00 per thousand for the timber, in consideration of defendants' making a further advance to him of the sum of \$500.00; held, that the consideration for the reduction of the price was not the payment of the \$500.00, but the payment of that sum in advance, with the understanding that it was to be credited on the purchase price of the timber.
6. **Contracts—Consideration.**—The payment, before it is due, of a portion of a purchase price of timber, is a sufficient consideration for a reduction in the price by the vendor.

N. J. WELLER and DISHMAN, TINSLEY & DISHMAN for appellants.

JAMES M. GILBERT for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming in part and reversing in part on the original appeal and affirming on the cross-appeal.

On December 17, 1910, Henry Broughton, by written contract, sold to B. Johnson & Son certain timber at the price of \$3.50 per thousand feet, mill measure.

Of the purchase money, \$500.00 was paid in cash, and Johnson & Son were given five years within which to remove the timber. On December 18, 1911, the parties

entered into another contract containing the following provision:

"Witnesseth: That for and in consideration of party of second part making a further advance to party of first part of the sum of (\$500.00) five hundred dollars, party of the first part does hereby agree to accept three dollars (\$3.00) per thousand feet mill measure, instead of three dollars and fifty cents (\$3.50) per thousand feet, as mentioned in contract dated December 17th, 1910, and recorded in Bell county instrument book No. 1, page 34, December 24th, 1910."

In settling with Broughton, Johnson & Son deducted the \$500.00 paid in advance from the purchase price of the timber.

On December 17, 1910, Oliver Smith sold to Henry Broughton certain timber at the price of \$2.50 per thousand feet, and Broughton was given two years within which to remove the timber. This timber was sold to Johnson & Son at the price of \$3.00 per thousand feet, but was not removed within two years. Thereafter Johnson & Son purchased the timber from Smith himself.

This suit was brought by Broughton against Johnson & Son to recover as follows: (1) The \$500.00 paid under the supplemental contract of December 18, 1911, on the ground that it was paid solely for a reduction in the price of the timber and should not have been credited on the purchase price; (2) the sum of \$420.00, the difference between the price that he paid for the Smith timber and the price which defendants agreed to pay; (3) the sum of \$600.00 damages to the timber, due to sap rot caused by defendants' permitting the timber to lie on the ground for several months before it was manufactured.

On final hearing, plaintiff's claim under item one was rejected, but he was given judgment for \$400.00 under item two, and for \$225.00 under item three. From this judgment defendants appeal, and plaintiff prosecutes a cross-appeal.

It is further insisted by the defendants that the chancellor erred in adjudging plaintiff any recovery under item 2. Plaintiff pleaded in substance that subsequent to the execution of the contract of December 17, 1910, there was a verbal agreement entered into between the plaintiff and defendants' agent, by which it was agreed that plaintiff should buy, and he did buy, a boundary

of timber from Ol Smith for the defendants, and the defendants and their agent agreed that they would take said timber so purchased from Smith and pay for it under the same terms set out in the contract of December 17, 1910; that pursuant to said verbal agreement he purchased said boundary of timber from Ol Smith and let the defendants have it, and that the defendants manufactured it into lumber; that under the terms of said contract, \$2.50 on each thousand was to be paid to Smith, and by agreement between plaintiff and defendants, plaintiff was to have for his services in purchasing said timber 50c per thousand; that the timber so purchased amounted to 840,000 feet, and that plaintiff was entitled to the sum of \$420.00, no part of which had been paid.

The defendants answered and denied the making of the aforesaid agreement. Plaintiff testified that C. L. Taggart was the agent of defendants with authority to purchase timber on their behalf. Taggart requested plaintiff to buy the Ol Smith timber and drew the contract by which Smith sold the timber to plaintiff. This contract gave plaintiff two years within which to remove the timber. The defendants proceeded immediately to cut the timber, but none of it was removed within the two years, but plaintiff frequently requested the defendants to remove it within that time. While testifying in rebuttal, plaintiff introduced a letter from Taggart, in which Taggart said:

"In accordance with conversation of yesterday, we will agree to go ahead and work out the timber on the Ol Smith and Britt Slusher tracts, under the same terms, price and conditions as specified in contract covering your timber, that is, the tract we bought from you on the 17th inst."

It further appears that the two years in which the Ol Smith timber was to be removed expired before its removal, and Smith objected to its removal. Thereupon, defendants bought the timber from Ol Smith and subsequently removed it. It is the contention of plaintiff that Johnson & Son owed him 50c for each one thousand feet of lumber which they had the right to remove and did not remove. On the other hand, Johnson & Son contend that the above letter was the only binding contract into which they entered, and since it shows that the purchase of the timber was made on the same terms and conditions as those specified in the contract for the sale

of Broughton's other timber, and since the latter contract provided for the removal of the timber within five years, they had the right to remove the timber in question at any time within five years. Of course, if there had been a binding contract for the purchase of the Ol Smith timber, and its resale to the defendants, its terms could not have been changed by the letter. However, under our statute and the rule in force in this state, no contract for the sale of standing timber is enforceable by action unless the contract or some memorandum thereof be in writing, signed by the person to be charged, or his duly authorized agent, and the person to be charged is the vendor. Sec. 13, subsection 1409, Kentucky Statutes; *Sears v. Ohler*, 144 Ky. 473, 139 S. W. 759; *Murray, City of v. Crawford*, 138 Ky. 25, 127 S. W. 494; *Burris v. Stepp*, 162 Ky. 269, 172 S. W. 526. It is likewise well settled that an agreement to purchase land or standing timber for another and then convey it to the promisee, is within the statute of frauds. *Day v. Amburgey*, 147 Ky. 143, 143 S. W. 1033; *Hocker v. Gentry*, 3 Met. 463; *Ross v. Leggett*, 61 Mich. 543, 28 N. W. 676, 1 A. S. R. 616, 20 Cyc. 234. And, where the plaintiff pleads an oral contract within the statute, the defendant may obtain the benefit of the statute under a general denial of the contract. *Hocker v. Gentry*, *supra*. Applying the above principles to the facts of this case, we find that plaintiff agreed to purchase the Ol Smith timber and convey it to the defendants at an increased price.

This contract was in parol. He did purchase the timber but never conveyed it to the defendants or made a written contract to convey it. Plaintiff, being the vendor, was the party to be charged. Under these circumstances, the oral contract with the defendants was not enforceable. Of course, if defendants had cut and removed the timber under the contract, they would have been liable for the purchase price. However, they did not cut and remove the timber under that contract, but under a subsequent contract made with Smith. Under these circumstances, they incurred no liability to plaintiff, and it was error to adjudge any recovery against them.

(2) On the question of damages due to sap rot, defendants contend that the evidence of those who knew shows that the damages allowed were far in excess of those actually sustained, while plaintiff asks that the allowance be increased. In reply to this contention it is sufficient to say that the case is one calling for the

application of the rule, that where the evidence on a question is conflicting, and upon a consideration of the whole case we cannot say with reasonable certainty that the chancellor erred in his conclusions, his finding will not be disturbed. *Burnett v. Miller*, 174 Ky. 91, 191 S. W. 659.

(3) Plaintiff's chief objection on the cross-appeal is that the chancellor erred in denying him any recovery of the \$500.00 paid under the supplemental contract. On this question, he claims that defendants were losing money on the original contract, and paid him the \$500.00 solely as a consideration for the reduction of the contract price. It appears, however, that on December 14, 1911, plaintiff wrote the defendants as follows:

"I am writing you in regard to the timber sold your agent about a year or more ago and they were to go to work as soon as practicable and push same to completion, and it seems to me they ain't doing any good, and I need some money as I am in the goods business and I would like for you to press them up. I also offered Mr. May 50c. off of each one thousand feet and ain't heard from you—I know I was losing money, but I need some very bad; if this don't suit you I would like for you to send me about \$500.00 and take it out of the timber as I will have 4 or 5 thousand dollars worth."

On December 16, 1911, Johnson & Son sent to plaintiff the following reply:

"We have your favor of Dec. 14th and have noted contents. In reply beg to say that you have misconstrued part of our contract. You will note by referring to same that we have five years in which to remove the timber. It also provides that you shall be paid by mill measure. Under the circumstances, however, we are willing to assist you in any way we can consistently and we are, therefore, sending to our Mr. May a supplementary contract, with instructions that when you sign same he can pay you \$500.00 more on this timber.

"We trust this will be entirely satisfactory and relieve you financially."

Thereupon, the parties executed the supplemental contract of December 18, 1911, providing, "that for and in consideration of party of second part making a further advance to party of the first part of the sum of \$500.00 party of first part does hereby agree to accept \$3.00 per thousand feet mill measure instead of \$3.50 per thou-

sand feet." It will thus be seen that the consideration for the reduction in price of the timber was not the payment of \$500.00, but the payment of that sum in advance, and that this sum was to be credited on the purchase price of the timber. But it is suggested that if this construction be given the contract, then the reduction of price was without consideration. The rule that the doing of something that the promisee is not legally bound to do is a sufficient consideration, applies to an act done by him before he is legally bound to do it, as, for instance, the payment of a debt or interest before it is due. 6 R. C. L., sec. 68, p. 657; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820. Here, the defendants had five years within which to cut and remove the timber, and until this was done further payments under the contract could not be insisted on. That being true, the \$500.00 paid under the supplemental contract was not then due. We therefore conclude that the payment of this amount in advance was a sufficient consideration for a reduction of the price of the timber.

On the cross-appeal the judgment is affirmed. On the original appeal, that portion of the judgment awarding damages for sap rot in the sum of \$225.00 is affirmed, and that portion of the judgment awarding plaintiff \$400.00 as commissions for the purchase of the Ol Smith timber is reversed, and cause remanded with directions to enter judgment in conformity with this opinion.

Louisville & Nashville Railroad Company v. Wright

**Louisville & Nashville Railroad Company v. Barr,
Administrator Winford Wright.**

(Decided March 21, 1919.)

Appeals from Franklin Circuit Court (Two Cases).

1. **New Trial—Newly Discovered Evidence.**—Where the issue upon a trial was whether the plaintiff was then suffering from systemic poisoning or tuberculosis, a petition for a new trial alleging that the defendant could prove by the attending physician of plaintiff who died three months after the trial, that he died of tuberculosis, but the witness did not know the duration or contributing causes of the disease, did not state newly discovered facts of such a decisive character on the issue tried as to author-

ize a new trial, and it was not error to sustain a demurrer thereto.

2. Master and Servant—Negligence.—A master having knowledge that the work required of a servant is liable to cause him some injury of which the servant does not know and failing to warn him of any danger, is liable for all the injurious consequences that are proven to have resulted from the negligence directly and without intervening cause, regardless of whether or not the master ought to have anticipated the particular consequences that did result.
3. Negligence—Actionable Negligence—Evidence.—Where no injury ought to have been anticipated, as a matter of law there is no actionable negligence, because in the absence of some danger reasonably to have been anticipated there was no duty to warn, but when actionable negligence has been established the proximate results and amount of recovery depend upon the evidence of direct sequences and not upon the defendant's foresight, and are for the jury.
4. Appeal and Error—Instructions—Exceptions.—The defendant to save any question of the insufficiency of an instruction presenting plaintiff's right to recover, need only object and except to its being given, and is under no duty to suggest by an offered instruction a necessary element of plaintiff's right of recovery, omitted from such an instruction.
5. Appeal and Error—Instructions.—An instruction which omits a necessary element of a party's theory of the case can not be said as to his adversary to be correct as far as it goes or in any sense, nor does the rule apply to the adverse party that if an instruction is correct as far as it goes any omission not suggested by offered instruction is waived.

GUY H. BRIGGS and BENJAMIN D. WARFIELD for appellant.

JAMES H. POLSGROVE, LESLIE W. MORRIS, and SCOTT & HAMILTON for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming one and reversing the other.

On July 6 and 7, 1916, Winford Wright, employed as a section hand for the L. & N. R. Co., at the direction of the section boss, helped unload, at Jett Station, ties that had been treated with creosote oil.

In the following March he filed the first of these actions to recover for injuries alleged to have been sustained as a result of defendant's negligence in failing to warn him of the danger in handling such ties, which work he alleged was dangerous to his health and person, of which defendant knew or ought to have known, but of which he did not know.

Defendant's answer traversed the allegations of the petition, and in separate paragraphs pleaded assumed risk, contributory negligence and that if plaintiff was injured, which was denied, it "was not a probable consequence that would usually or ordinarily result from handling ties that had been treated with creosote oil," but "was due from some idiosyncrasy or peculiar susceptibility possessed by him and which does not exist in the ordinary run of men," and which was not known and could not have been known by the exercise of ordinary care, by defendant. A reply traversed the allegations of the answer.

A trial on September 18, 1917, resulted in a judgment for \$5,000.00 in favor of the plaintiff, from which judgment the first appeal is prosecuted.

On December 20, 1917, the plaintiff died and the defendant brought suit against his administrator for a new trial, in which, after setting out the facts with reference to the former trial, it is alleged:

"Plaintiff says that one of the issues, and the principal issue, on the trial of the said action of Winford Wright against Louisville & Nashville Railroad Company at said term of this court, was the nature of plaintiff's disease and the question of whether or not that disease was the result of the handling of the creosote ties.

"The plaintiff states that it was admitted by both plaintiff and defendant in that action that tuberculosis was not and could not be the result of the handling of the creosote ties and the defendant contended that the plaintiff then had, and had, prior to the institution of this action, tuberculosis of the lungs, and the plaintiff denied this and said he was suffering from creosote poisoning, which affected his liver, muscles, nerves and eyes.

"Plaintiff states that on the issues thus formed a great deal of medical testimony was taken. All of the plaintiff's medical witnesses testified positively that he had no form of tuberculosis, and could not have contracted same as the result of handling creosoted ties. The defendant's medical witnesses all testified that he had tuberculosis but that he could not have contracted it from the handling of creosoted ties.

"Plaintiff states that thereafter the term of court in which this plaintiff's motion and ground for new trial was overruled on December 20, 1917, the said Winford

Wright died, and died as this plaintiff can and will prove, of tuberculosis of the lungs.

"Plaintiff states that he is able to prove this fact by Dr. Warren Monfort, who, on the 22nd day of December, 1917, certified that fact to the Registrar of Vital Statistics of the State Board of Health of the Commonwealth of Kentucky, a copy of which certificate is filed herewith.

"Plaintiff says that in the natural course of events it did not know these facts and could not have known these facts until after the term of this court had come to an end and the court had finally adjourned for said term, and that it is now willing, able and ready to prove the facts above set forth.

"Wherefore, the plaintiff prays that this court set aside the judgment entered heretofore in this case and grant this plaintiff a new trial in that case."

A certified copy of the report of the attending physician, Dr. Warren Monfort, to the Registrar of Vital Statistics is filed as an exhibit, in which it is stated: "The cause of death was as follows: Tuberculosis of lungs; Duration.....years.....mos.....ds. Don't know. Contributory: Don't know."

A demurrer was sustained to this petition for a new trial and the petition dismissed, from which judgment the railroad company is also appealing, the two appeals, by agreement, being heard together, and we shall first dispose of the latter.

It is insisted by counsel for the company, that since the demurrer admits all facts pleaded, death from tuberculosis is established upon newly discovered evidence and that fact is so conclusive of the issue tried and decided adversely to it as to furnish ground for a new trial; but is the fact that decedent died of tuberculosis three months after the trial, if admitted, conclusive or convincing proof that he had that disease at the time of the trial, as testified by medical witnesses for defendant, but denied by about the same number of physicians who testified for the plaintiff, who stated he was then suffering from systemic poisoning resultant from absorption of creosote? It is not alleged in the petition that this is true or could be proved and we would hardly risk the statement that such a fact is a matter of common knowledge, but further than this the petition states the newly discovered evidence to be the report of the attending physician, which surely can not be accepted for more than his opinion that decedent

died of tuberculosis, especially since he states he does not know the duration or any contributory cause of the disease, and there is no allegation or statement indicating any conclusive test or post-mortem examination or by what means this opinion or conclusion was reached. Hence we think the fact admitted upon demurrer to the petition is that Wright died of tuberculosis three months after the trial, as could be shown by the evidence of Dr. Montfort, who knows nothing of the duration or contributing causes of the disease.

This new evidence certainly does not bring the case within the rule announced in *Anschutz v. Louisville Ry. Co.*, 152 Ky. 741, chiefly relied upon by appellant, where a female, after recovering damages for negligence which was held upon conflicting proof to have rendered her barren, gave birth to a child, nor is the newly discovered evidence of the decisive character held to be necessary to warrant a new trial in the other cases cited. *Mason, Evans & Keys v. Meloan*, 165 Ky. 582; *Smith v. Chapman, &c.*, 153 Ky. 70, and *National Concrete Cons. Co. v. Duvall, &c.*, 153 Ky. 394. Hence the court did not err in sustaining the demurrer to the petition for a new trial, and the judgment in that case is affirmed.

2. For reversal of the original judgment, it is urged first and principally that under the allegations of the petition and the proof, damages for only temporary or external and not permanent or internal injuries should have been allowed. We do not deem it necessary to discuss separately the allegations of the petition which we consider sufficient to support the verdict, because the whole question is presented by a consideration of the evidence. The only negligence alleged or supported by proof is the failure of defendant to warn plaintiff of any danger incident to handling creosoted ties, of which fact the evidence is quite contradictory, as it is upon the questions of whether or not there was any such danger, and whether the defendant had knowledge of any such danger. So these questions of fact were properly submitted to the jury. The real controversy is about the extent of the danger and the consequences of the neglect to warn if the jury believed from the conflicting evidence there was danger of which the defendant knew and failed to warn plaintiff, and as the jury found for plaintiff we shall assume for the purposes of this discussion there was danger of injury, at least externally, to persons handling creosoted ties.

soted ties, and the defendant knew of the danger of external injuries and failed to warn plaintiff thereof. There is, however, no proof that defendant or its agents had actual knowledge that there was any danger of internal injuries from handling creosoted ties, and its evidence is uncontradicted that this is the first instance of internal injuries from such work, if such it is, that has come to the knowledge of its agents and several disinterested witnesses, although experienced for many years in handling ties and other timber treated with creosote oil produced from coal tar as a preservative, just as in this case. We shall therefore also assume, but do not decide, that defendant could not by the exercise of ordinary care have known there was danger of internal injuries from such work, although it was shown by the evidence that technical works upon materia medica record the possibility of systemic poisoning by absorption through the pores of the skin from contact with coal tar creosote, or from inhalation of the fumes therefrom, and counsel for plaintiff have cited two cases from courts of last resort, one from Illinois, decided in 1910, and the other from Texas, decided in 1915, in both of which such results were established to the satisfaction of the juries, from which it might well be argued defendant could have known and ought to have foreseen the possibility of internal as well as external injury. We shall further assume, for the moment, that plaintiff did not know of any danger from such work because omitted from the instruction defining his right of recovery, although a controverted necessary element of such right and about which the evidence was conflicting.

Thus stripped, our inquiry is reduced to whether or not the defendant, with knowledge that the work required of plaintiff, was liable to cause him some injury of which he did not know, and having failed to warn him of any danger, is liable for whatever injury he sustained, as is contended by counsel for plaintiff, or is liable only for such injuries as the defendant in the exercise of ordinary care ought to have known might result, as is contended by counsel for the defendant. The two cases cited by defendant, *Pinkley v. C. & E. I. R. Co.*, 246 Ill. 370, 92 N. E. 896, 35 L. R. A. (N. S.) 679, and *Pecos & N. T. Ry. Co. v. Collins*, 173 S. W. 250, are exactly in point and sustain its contention, although from the former opinion three members of the court dissented. Both of these cases,

the latter basing its decision upon the former, held that for constitutional disorders or systemic poisoning, that is the internal effects, which constitute the chief ground of complaint and basis of recovery in both cases, no recovery can be had for the reason that such consequences were not in law the proximate results of the negligence of the railroad company in requiring their employes to handle creosoted ties without warning them of the danger, because the danger of such internal effect was not shown to have been known, or that it could have been known by the exercise of ordinary care, to have been liable to result and was not therefore a natural or probable consequence of the negligence that ought to have been foreseen in the light of the attending circumstances. Both cases are based upon the general rule that the damages which are recoverable for negligence must be such as are the natural and reasonable result of defendant's act, and the consequences must be such as in the ordinary course of things would flow from the acts, and can be reasonably anticipated as a result thereof.

This court, in the case of *Gosney v. L. & N. Ry. Co.*, 169 Ky. 323, after a careful examination of the authorities from many jurisdictions, stated the rule thus:

"It is generally held that in order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

While this language is broad enough to give support to the defendant's contention, it must be remembered that it is a statement of a general rule, and as such is possibly as accurate as could have been employed; at least it is the accepted statement of the general rule. An examination of the case, however, will show that the rule was applied, as is usually the case, simply to show that the defendant incurred no liability where no danger of any kind to the plaintiff ought to have been foreseen in the light of the attending circumstances as the natural and probable consequence of the alleged negligence or wrongful act, and this is, we apprehend, the full extent of its meaning and correct application, since otherwise it will not fit in harmoniously with many decisions of this court as well as others, holding that where injury ought to have been foreseen and anticipated from a negligent

act, the defendant is liable not only for such consequences as it knew or in the exercise of ordinary care ought to have known might result from its negligence, but for all consequences that, free from intervening causes, proximately result regardless of whether or not the particular consequences that did result ought to have been anticipated.

In the Gosney case, as in the Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531, cited in the Pinkley case as sustaining its conclusions, the act complained of was not actionable negligence, because no injurious consequences to the plaintiff ought to have been anticipated as the natural and probable result thereof, and the general rule as stated was applicable, while in the case at bar, as in the Pinkley and Collins cases, the act complained of was actionable negligence because some danger ought to have been anticipated as the natural and probable consequence to plaintiff from the failure to warn, and in our judgment the general rule is not applicable.

The question gets down in the final analysis to whether or not, after actionable negligence by defendant to the plaintiff has been established, the court or the jury is the proper tribunal to decide what parts of the consequences proven to have followed directly and without intervening causes from the act complained of, are the proximate result of the established negligence. Of course, if there is no proof that any injurious consequence has followed directly and without intervening causes from the negligence complained of, the question is for the court, but as we shall attempt to show if there is any evidence that an established condition was produced directly and solely by the negligence, the question is for the jury upon all the evidence and under proper instructions to decide whether it is a proximate result.

Manifestly attempting to apply the first part, and overlooking or not agreeing to the latter part of this proposition, it was held in both the Pinkley and Collins cases that as a matter of law internal injuries from handling creosote timber were not proximate results of a neglect to warn, simply because there was no proof that such injuries might have been foreseen as an ordinary or natural consequence of a failure to warn. We find ourselves unable to agree with this conclusion, although within the letter of the general rule and although we have been unable to find any case exactly in point upon all of

its facts as are these two cases; however, there are many analogous cases from this and other courts which are not only not in harmony with, but are directly opposed to, the conclusions reached in the Pinkley and Collins cases.

In *L. & N. R. R. Co. v. Daugherty*, 108 S. W. 336, the defendant insisted that it was only liable for the specific discomforts, which it ought to have foreseen and which were imposed upon the plaintiff by the violation of the duty it owed her not to obstruct a public crossing for an unreasonable length of time; and that it was not liable for any aggravation of an existing disability, because such a consequence could not have been reasonably foreseen or anticipated by the defendant, and therefore was not the proximate result of the negligence complained of. In denying this contention, the court said:

"It is sufficient to say that, when an act of negligence has been committed, or a wrongful act done, resulting in injury or damage, the party committing it will be responsible for all the consequences that naturally and reasonably flow from the negligent or wrongful act, although the result may not be immediately connected with the cause."

In the case of *Seekinger v. Philibert & Johanning Mfg. Co.*, 31 S. W. 960, the Missouri Supreme Court, in disposing of the defendant's contention that it was not liable for tuberculosis proven to have resulted to the plaintiff from being struck in the chest by a piece of wood, as the result of the defendant's negligent act, because it could not have anticipated such a consequence, said:

"A still further contention is that the disease of pulmonary consumption did not result proximately from the blow plaintiff received on the chest, and it was error to permit the jury to take it into consideration in considering their verdict. This was a question for the jury under the evidence, which tended to show that consumption was superinduced by the blow on the breast. There was no intervening agency in this case, between the blow on the chest and the consumption, which followed in a few months thereafter."

In *Kentucky Heating Co. v. Hood*, 133 Ky. 389. citing many authorities, we said:

"It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts, the rule generally held to is, that only such

damages can be recovered as are actually sustained, or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into. 2 Chitty on Contracts, p. 1324. But this measure that obtains in contracts will not be applied in actions sounding in tort. There is a wide difference between the rights and remedies allowable in the one case and in the other. 1 Sutherland on Damages, Sec. 15.

"It is the wrongful act done, and the consequences that naturally result from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are the result of, this wrongful act, although he may not at the time have given any thought to or have anticipated that injurious consequences would follow. It is no excuse or defense for the wrongdoer that he did not mean to commit any wrong, or did not know that any injury or loss would ensue."

This ruling was expressly approved in *L. & N. R. Co. v. Haggard*, 161 Ky. 317; *Lyttle, Admr. v. Harlan T. & T. Co.*, 167 Ky. 345, and *L. & N. R. Co. v. Comley*, 169 Ky. 11, but it must be noticed that cases which go to the extent of holding the tortfeasor liable for all damages which proximately follow, or at all, regardless of whether any injury ought to have been reasonably anticipated are sustained by reason only where the tort amounts to active or wanton wrong such as trespass or assault, rather than ordinary negligence; for example, the wrongful act complained of in the case at bar is only ordinary negligence, that is a failure to perform a duty and not an active invasion of a right; nevertheless it is based upon tort and not upon a breach of contract, and the damages can not therefore be limited to anticipated injuries; but the right of action being for ordinary negligence, depends necessarily upon the reasonable anticipation of some injury because otherwise there is no breach of duty, and hence no negligence or wrongful act.

These distinctions are frequently ignored in the preparation and trial of cases and as a consequence many decisions may be found in which it is broadly stated that only such consequences as ought to have been anticipated are proximate results without reference to whether the suit is for damages for breach of contract, ordinary negligence or active wrong, and this fact accounts for much

of the confusion that exists with reference to proximate cause and its proximate results. :

But we are relieved of the duty of an examination of the cases in an effort to harmonize or distinguish them according to these distinctions, since we find in 22 R. C. L., pages 125 and 126, a statement of the rule or rather an exception to the general rule, which we believe to be applicable here, with citation of authorities, an examination of which proves not only the recognized existence and soundness of the exception, but also that the application of the general rule in the Pinkley and Collins cases was not in harmony with the decisions in either Illinois or Texas. After restating the general rule in almost the exact language employed in *Gosney v. L. & N. R. Co.*, *supra*, the author proceeds:

"It must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty. In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question.

"Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. The test is: would ordinary prudence have suggested to the person sought to be charged with negligence that his act or omission would probably result in injury to some one? It is otherwise, however, where there is an intervening efficient cause, in itself sufficient to break the causal connection between the original wrong and the injury. The reasoning on which this rule is founded is that the law regards only the general character of the act, for, as was remarked: 'When there is danger of a particular injury which actually occurs, we must surely say that is the usual, ordinary, natural and probable result of the act exposing the person or thing injured

to the danger.' The result seems to be that, when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act. To hold so would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable."

(See also 13 Cyc. 46; 29 Cyc. 493; Thompson on Negligence, sec. 59; Note at page 810 in 36 A. S. R. and cases cited on page 665 of vol. 6, L. R. A. Extra Ann.)

Anticipation of injury as a natural and probable result has nearly always been recognized as a necessary element of actionable negligence, and correctly so, but we submit in reason and upon authority too, it is only necessary to constitute actionable negligence that *some* injury ought to have been reasonably anticipated from the negligent act, and that when actionable negligence has been established the tortfeasor is liable for *all* consequences that proximately result, without regard to just what injuries he ought to have anticipated, and that the jury rather than the court must decide from the evidence what consequences are proximate results, otherwise the court invades the province of the jury to determine the amount of damages that have proximately resulted from actionable negligence.

In the case at bar the jury have found from the conflicting evidence, as they had the right to do, that plaintiff's internal and permanent as well as his external and temporary injuries followed in unbroken sequence and solely from the failure to warn plaintiff of any danger; there was no evidence of any other or intervening cause to account for his change from a strong, robust man at the time of the injury to a physical wreck at the time of the trial, and we can see no justification for permitting the court to say that as a matter of law only such injuries as the defendant ought to have foreseen are proximate results, although we can and do understand perfectly the reason why the court must say as a matter of law there was no actionable negligence where no injury ought to

have been anticipated, because if no injury ought to have been foreseen there was no duty to warn, but when the failure to perform a duty has been established the proximate results and amount of the recovery depend upon the evidence of direct sequences, and not upon the defendant's foresight, and are for the jury, subject only to the power and duty of the court to set aside a verdict flagrantly against the evidence.

3. It is also insisted the court erred in refusing instructions C and D offered by defendant, the former eliminating any idiosyncrasy or peculiar susceptibility of plaintiff, as a basis of recovery and the latter limiting the recovery to external injuries, but there was no proof to support the former, which would not have been proper in any event, and the latter was not authorized as we have already decided.

4. Another insistence is that the motion for a directed verdict should have been sustained because of plaintiff's failure to prove his alleged lack of knowledge of danger, but upon this question the evidence was conflicting as plaintiff testified he did not know of any such danger, in which he was contradicted by one of defendant's witnesses, and although he admitted some inconvenience the first evening, July 6th, we do not consider it possible to so separate the two successive days, July 6th and 7th, he was engaged in this work as to be able to say as a matter of law that his injuries were the result of the second day's work, and that the first day's experience was sufficient to establish knowledge of danger; hence the court did not err in refusing to take the case from the jury.

5. Finally it is urged the instruction defining plaintiff's right to recover was prejudicially erroneous in failing to make his alleged ignorance of danger an element of that right, and this was error as this fact was at issue upon both the pleadings and the proof, and he could recover only if the jury believed from the evidence that he did not know the work was dangerous. Defendant objected and excepted to this instruction, but counsel for plaintiff insist the instruction is correct as far as it goes, and as defendant offered no instruction covering the point he can not complain of the error under the thoroughly established rule to that effect. The trouble with this argument is that neither the statement of fact nor the rule though thoroughly established is applicable. The

instruction complained of presents plaintiff's theory of the case and in so doing omits a necessary element of his cause of action and right to recover, and all that the defendant needed to do to save the question of any defect, therein, was to object and except, since it was under no duty to supply omissions or correct mistakes in the instruction for his adversary. The rule relied upon refers only to instructions presenting the theory of the party objecting, who, to save an omission, must not only object and except, but offer an instruction covering, though incorrectly, the point omitted. See *L. H. & St. L. Ry. Co. v. Roberts*, 144 Ky. 824, for a statement of the rule; also *L. & E. Ry. Co. v. Crawford*, 155 Ky. 723; *Hobson on Instructions*, sec. 41, and cases there cited. It would not do to say an instruction presenting an adversary's theory of the case was correct as far as it goes, or correct in any sense, if it did not go far enough to present all essential elements of his right of recovery, and to apply the rule, as plaintiff seeks to do here, and as was said in *C. N. O. & T. P. Ry. Co. v. Martin*, 147 Ky. 262, might be done under similar circumstances, although the case was in fact affirmed because the omitted part complained of was not essential, would place upon the defendant not only the duty of seeing that its defense was properly presented, but also the duty of showing the plaintiff and the court how his right of recovery ought to be presented to the jury. Such a duty can not be imposed upon an adversary, and the rule under consideration can not be carried to that length without doing violence to every recognized rule of practice. As this error permitted a recovery regardless of a necessary element of the right to recover, which was in issue, it was necessarily prejudicial.

Wherefore the judgment in the original case is reversed and the cause remanded for another trial consistent herewith.

Franz v. Jacobs.

(Decided March 21, 1919.)

Appeal from Greenup Circuit Court.

1. **Waters and Water Courses—Easements.**—An upper proprietor has an easement in the land of his adjoining neighbor below for

the natural flow of surface water and that in natural streams, and the lower proprietor may not interfere with either by the construction of dams or otherwise impeding the flow.

2. **Waters and Water Courses—Surface Waters.**—The owner of the upper estate may not collect or concentrate on his land surface water and then empty it in volume upon his adjoining neighbor below, nor can he by artificial means cause increased amounts of water to flow into natural streams so as to damage the lower proprietor.
3. **Waters and Water Courses—Damages.**—To enable the lower proprietor to maintain a suit for a violation of his rights by the upper proprietor he must show that the damage and injury of which he complains is the proximate result of the alleged wrongful act.
4. **Appeal and Error—Finding of Chancellor.**—Where the evidence is conflicting and the mind is left in doubt as to the truth of the matter, this court will give weight to the finding of the chancellor and adopt it.

S. S. WILLIS and R. D. DAVIS for appellant.

ALLEN D. COLE and W. T. COLE for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

Appellant, plaintiff below, and appellee, defendant below, own adjoining farms in Greenup county, both of which border on the Ohio river, which at that point runs east and west. Defendant's farm lies above that of plaintiff, and some distance from the river bank on defendant's farm, is a natural sag, slough or depression running entirely across the farm and extending upon the next adjoining one on the east. The lower end or foot of the sag extends to or perhaps upon a small portion of plaintiff's farm. Between the bank of the river and the slough or sag is a slight elevation called by the witnesses a ridge. There is a narrow place in the ridge a short distance from the line between the farms of plaintiff and defendant, and through this narrow place there was an old ditch leading from the sag on to the low ground immediately next to the river, and when open would permit the water which collected in the sag to run out and find its way into the river, which could be done only when the river was not high enough to prevent it. According to the testimony the ditch was an artificial one, but when it was dug or by whom, no one seems to be able to tell. In times of high water it would fill with drift and debris and would constantly have to be cleaned out. In the fall of 1913 de-

defendant put an eight-inch sewer pipe from the bank of the river through the ditch and up the sag to the lowest point in it and constructed a dam across the ditch. The purpose of this work was to have the sewer drain off the surface water which would collect in the sag and also the overflow water which would be left in it in times of floods, and the dam constructed across the ditch was to prevent the water from the river running into the sag at ordinary stages of the water. Plaintiff, upon the theory that the stopping of the ditch caused the water in the sag to flow over his land below and wash away and damage it, brought this suit in which he sought a mandatory injunction against defendant, commanding him to remove the dam, and to recover the sum of \$500.00 for damages which he alleged had accrued since the dam was constructed.

The answer denied the allegations of the petition and claimed that defendant had the right to stop the ditch by constructing the dam, upon the ground that it was not a natural stream but an artificial one, in the continued opening of which plaintiff had no rights. Appropriate pleadings made the issues, and upon hearing, after proof taken, the court dismissed the petition, and to reverse that judgment plaintiff prosecutes this appeal.

The civil law governing the rights of contiguous owners of land relative to the flowing of surface water as well as that in natural streams has been adopted in this state, and it is, that an upper proprietor has an easement in the land of the lower proprietor for the escape from his land of both surface water and that running in natural streams, which right the lower proprietor may not interfere with or obstruct by any act which would prevent the flowing of either surface water or that carried by natural streams. A corresponding duty is imposed upon the upper proprietor not to collect surface water into a volume and empty it upon the lower proprietor, nor can he by such means augment the flow of a natural stream so as to damage his neighbor below. These rules with their application to the various facts presented are adopted in the cases of *Moody v. Fremd*, 177 Ky., 5; *Pickerill v. City of Louisville*, 125 Ky. 213; *Kemper v. City of Louisville*, 14 Bush, 87; *Hahn v. Thornberry*, 7 Bush 413; *Grinstead v. Sanders*, 22 Ky. Law Rep., 51; *Robertson v. Daviess Gravel Road Company*, 116 Ky. 913, and other cases which might be cited.

Plaintiff claims that under the law as announced in the cases referred to he has the right to maintain this action, since he contends that by the damming of the ditch defendant permitted the surface water to collect in the sag without an outlet and forced it to run over plaintiff's land, and that in doing so he stopped what plaintiff insists is a natural stream, thereby causing the water to flow upon his land in increased quantities or in such a way as to produce the damages complained of. If the facts assumed in plaintiff's petition were established there could be no doubt about his right to relief. As we read the record there is no proof to show that any of the water producing the damage was collected surface water. On the contrary, it is conclusively shown that the sewer mentioned is amply sufficient to and does drain from the slough or sag all surface water, at least enough to keep it from getting out of the banks of the sag and flowing over plaintiff's land. The proof is that plaintiff's land at the place of which he complains is more than one foot higher than the point where the dam is constructed, and the flood water would not run over *that place* when it was to the top of the dam. So that it is a difficult matter to see how the dam could cause the water to flow over a place which was higher than the dam. Moreover, a number of witnesses—greater, numerically, than those testifying for plaintiff—who have long been familiar with that territory and surrounding conditions testified that the construction of the dam did not cause an increased amount of water to flow over plaintiff's land. On the other hand they testified—which testimony seems to accord with natural principles—that the construction of the dam prevents the water in ordinary stages (and except in times of high floods) from getting into the sag and thereby serves to protect at least that part of plaintiff's land covered by the depression. To this extent it benefits him. When the waters of the river are at sufficient flood stage to go over the dam and thereby fill the sag, it is also at that time over a large portion of plaintiff's farm, and then no water could run through the ditch so as to lower the water in the sag to any extent because the river into which it would have to empty would be full. When the water in the river would recede so as to get below the dam and permit the ditch if open to drain the sag, that portion of plaintiff's farm about which he complains, being higher, would be free from water. We therefore conclude

that defendant's witnesses had scientific grounds upon which they could base their testimony, as well as upon their actual observations.

It is true plaintiff shows that a small portion of his land in floods occurring in 1913 and since then has to some extent washed, but there is plenty of testimony to show that this is a usual and ordinary occurrence with land contiguous to a stream like the Ohio river. It also appears from the testimony that some floods will wash the overflowed land, while others will deposit sediment thereon, dependent upon the duration of the rise in the river. So we conclude that the essential fact entitling plaintiff to the relief he sought, i. e., damage as a proximate result of the acts complained of, having been put in issue and determined by the trial court against him upon sufficient evidence, there is no course left to us but to affirm the judgment. In cases like this the rule is that where the evidence is conflicting and the mind is left in doubt as to the truth of the matter, some weight will be given to the finding of the chancellor. *Campbell v. Trosper*, 108 Ky. 602, and *Moody v. Fremd*, *supra*.

Another question presented and discussed by defendant's counsel is that the rules of law governing the rights of adjoining properties with reference to the flowing of both surface water and that in natural streams have no application to the damming or destruction of an artificial ditch. This contention is attempted to be met by plaintiff's counsel with the argument that where the artificial ditch has existed for such a length of time as to give the complaining party a prescriptive right in its continued maintenance, the same law would apply as though the ditch were a natural stream.

However interesting it might be to take up and discuss these questions, we are not disposed to do so in view of the fact that the judgment will have to be affirmed upon the chancellor's finding of fact.

Wherefore, the judgment is affirmed.

Bryant v. Meadors, et al.

(Decided March 21, 1919.)

Appeal from Whitley Circuit Court.

1. **Trespass—Title—Evidence.**—In an action to enjoin trespass where only the title of plaintiff is put in issue, his success de-

pend upon the strength of his own title and not upon any weakness in that of the defendant.

2. **Public Lands—Patents—Title—Evidence.**—But where the validity of plaintiff's title depends upon whether or not a previous survey, the basis of defendant's patent, is an exclusion by the terms of plaintiff's patent or invalidates it pro tanto under section 4704 of the Statutes, it becomes necessary in order to determine the validity of plaintiff's patent to ascertain whether or not defendant's prior survey is valid, since only legal subsisting prior surveys are excluded from or invalidate a subsequent survey or patent.
3. **Public Lands—Entry, Survey and Patent.**—Land warrants issued by the Whitley County Court under the acts of the Legislature of 1835 and 1837, in consideration of bonds rather than cash, and entries and surveys made thereon, are legal only if actually paid for in money or labor and filed together with any plat or certificate of survey made thereon, with register of the land office on or before March 1, 1852, as required by the acts of 1850 and 1851, and the defendant's survey and the land warrant under which it was made, not having been thus legalized, was not a legal subsisting previous survey; and was not an exclusion from nor did it invalidate plaintiff's subsequent entry, survey or patent.
4. **Public Lands—Validity of Patent.**—While a patent valid on its face can not ordinarily be attacked collaterally, upon such an attack the warrant, certificate of survey and other papers required to be filed in the land office and referred to in the patent as authority for its issuance, may be read with the patent to show its invalidity.
5. **Public Lands—Patents.**—Parties can not acquire under an invalid survey or patent such vested interests as alone will defeat a valid patent.
6. **Public Lands—Survey—Title.**—The fact that in an old suit to which plaintiff was neither a party nor a privy, an attack failed upon defendant's survey does not estop her from asserting her title, although she or her agents were living in the vicinity of the land at the time.

STEPHENS & STEELY for appellant.

TYE & SILER and POPE & ROSE for appellees.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

The appellant, who was plaintiff below, sought by this action to enjoin appellees from trespassing and cutting trees upon about sixty-five acres of land adjoining the town of Pine Knot, now in McCreary, but formerly in Whitley county; and although she must of course recover upon the strength of her own title, and not upon any weakness of that of the defendant, since only her title

is put in issue, strangely enough, the question involved is whether or not a survey made December 21, 1853, upon which, on December 10, 1872, a patent for 200 acres was issued to Jacob E. Harmon, through whom the defendants claim title, was a valid survey. This is true because the patent under which plaintiff claims was issued October 18, 1855, on a survey made August 30, 1854, to Wait and Hudson, for 9,600 acres, nearly twenty years before the Harmon survey was carried into grant, and the land in controversy is shown to be within its exterior lines and outside its exclusions, unless the prior Harmon survey is an exclusion or *pro tanto* invalidates the Wait and Hudson patent which has been upheld as a valid patent by this court many times. (See *West v. Chamberland*, 109 Ky. 194; *Bryant v. Stephen*, 26 R. 718; *Bryant v. Strunk*, 28 R. 556; *Steele v. Bryant*, 132 Ky. 569; *Bryant v. Prewitt*, 132 Ky. 799; *Slaven v. Darity*, 142 Ky. 640; *Watts v. Bryant*, 144 Ky. 14; *Bryant v. Kentucky Lumber Co.*, 144 Ky. 755; *Bryant v. Strunk*, 151 Ky. 97; *Ford v. Bryant*, 158 Ky. 97; *Bryant v. Arnold*, 161 Ky. 736; *Boyatt v. Stearn Coal Co.*, 178 Ky. 674.)

Both patents cover the land in controversy, and the Wait and Hudson patent by its terms excludes "all land previously surveyed." But whether this were true or not, it would have been void under sec. 704 of the Kentucky Statutes, as to all land included which had been previously surveyed, and it is insisted by counsel for appellees that as the survey for their patent was made December 21, 1853, and appellant's survey was not made until August 30, 1854, nor his patent issued until October 18, 1855, their land was excluded from his patent both by its terms and by the statute. This however, is not necessarily true, because it is only subsisting legal entries and surveys that are excluded by such a reference in a patent, and for which the statute invalidates subsequent entries, surveys or patents. (*Stansberry's Heirs v. Pope*, 5 J. J. Mar. 192; *Bryant v. Kentucky Lumber Co.*, 144 Ky. 755; *Ford v. Bryant*, 158 Ky. 97; *Mason v. Fuson*, 171 Ky. 111; *Stephens v. Terry*, 178 Ky. 129.)

It therefore becomes necessary to determine whether or not defendants' survey made by Harmon December 21, 1853, was a valid survey, in order to determine the validity of plaintiff's title under a subsequent survey and patent. The Harmon patent recites "that by virtue and in consideration of an order from the Whitley county

court, there is granted by the said Commonwealth unto Jacob E. Harmon, assignee of Cox, Williams and McLancy, a certain tract or parcel of land containing 200 acres, by survey bearing date of 21st day of December, 1853, lying and being, &c., &c." The order from the Whitley county court, referred to above as authority for the issuance of the patent as shown by the records of the Kentucky Land Office, is Whitley County Land Warrant No. 464, and shows upon its face that it was issued on February 25, 1851, in consideration of a bond for \$1,000.00, and not for cash as required by the acts of the legislature of 1835 and 1837, which authorized the issuance of such warrants by the county courts as the first necessary step in acquiring title by patent from the Commonwealth to vacant lands. It having been brought to the attention of the legislature that a great many such warrants had been issued by the Whitley county court for bonds instead of cash, the legislature, by special acts approved March 5, 1850, and March 8, 1851, legalized all such warrants irregularly issued by the Whitley county court, upon condition that they actually be paid for in money or labor and be filed, together with any plat or certificate or survey made thereon, with the register of the land office, on or before March 1, 1852.

In considering these acts and in determining the validity of the precise warrant No. 464, issued by the Whitley county court, this court, in the case of *Bryant v. Kentucky Lumber Co.*, *supra*, said:

"The plain purpose of this act (the one approved March 8, 1851) was to require all these matters to be closed up by March 1, 1852; that is, the parties who had made these surveys were given a year to pay the price and take out their grants. The necessary meaning of the statute is that they were required to pay the price and register their surveys within the time specified and that they could not do so thereafter."

This court again in the case of *Stephens v. Terry*, *supra*, held Whitley County Land Warrant No. 464 invalid. It is therefore apparent that the survey made December 21, 1853, upon which the Harmon patent rests, was not a valid subsisting survey when the Wait and Hudson survey was made and the patent issued thereon, and therefore neither excluded nor invalidated any part of the land included in the Wait and Hudson survey and patent; and of like impotency was the payment to the

Whitley county court September 1, 1872, that portion of the money due for the Harmon survey upon the bond upon which warrant No. 464 was illegally issued, as this was done long after the expiration of the time given by the legislature for making payments to legalize such warrants.

But counsel for appellees insist that since this is a collateral attack upon their patent, which is regular upon its face, its validity can not be questioned in this action. They overlook the fact, however, that it is not the validity of their patent that is in question here, but the validity of plaintiff's patent, so far as the land in question is concerned, depends upon whether their survey was a valid subsisting survey so as to constitute an exclusion by the terms of plaintiff's patent and *pro tanto* render same void under sec. 4704 of the statutes.

Hence there is no place here for the application of the rule that a patent valid upon its face can not be collaterally attacked; even if it were otherwise, this case falls within one of the recognized exceptions to that rule, since defendant's patent upon its face purports to have been based, and is shown by the records to have been issued upon Whitley County Land Warrant No. 464, and the survey of December 21, 1853, and as stated in *Bryant v. Kentucky Lumber Co.*, *supra*, these papers may be read with the patent to show its invalidity upon a collateral attack.

We are also urged by counsel for appellees not to declare their survey illegal upon the ground that to do so will disturb numerous and valuable vested interests of many citizens of the town of Pine Knot, which is largely built upon the northern half of the Harmon patent; but even if this were true, that fact could not under any principle of law with which we are familiar, control our decision of this case to which none of the owners of these vested interests is a party; however, as a matter of fact, from the evidence in this case, counsels' fears do not seem to be warranted, because plaintiff's son and her only witness, testifies that his mother and those under whom she claims, many years ago sold and conveyed the surface of the land upon which Pine Knot is largely built, and that the parties who now own and have improved this land claim and hold same by title derived through her and her vendors, and that she now claims no interest in

any part of the surface of the Harmon patent, except that involved here.

Another contention advanced by appellees, is that because in an old suit to which plaintiff was neither a party nor privy, an attack upon the validity of the Harmon patent failed, she is estopped to deny its validity because she or her agents in charge of her property in the vicinity must have known of this contest and its outcome; but these facts are clearly insufficient to constitute an estoppel, even if one had been pleaded, which was not done.

These conclusions render it unnecessary for us to consider the plea of adverse possession by which plaintiff also attempts to establish title to a part of the land in controversy.

For the reasons indicated, the judgment is reversed and the cause remanded with instructions to grant plaintiff the relief asked.

Lisle's Administrator, et al. v. Lisle, et al.

(Decided March 21, 1919.)

Appeal from Clark Circuit Court.

1. **Judicial Sales—Appraisement—Coercive Sales—Sales for a Division of Proceeds.**—The statute requiring an appraisement applies to all coercive sales for the payment of debts, but does not apply to sales of land made under section 490, Civil Code, for a division of the proceeds.
2. **Partition—Sale of Property—Joint Owners.**—Civil Code of Practice, section 490, provides that a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, though one of them is an infant, if the estate be in possession and the property cannot be divided without materially impairing its value or the value of plaintiff's interest therein. By act of 1916 (Acts 1916, chapter 119, page 707) section 490 was amended so as to authorize a sale, "if the estate shall have passed by devise or descent to the widow and heir or heirs of a decedent, and the widow shall have a life right in a portion thereof, either as a homestead or dower or by devise, and the said property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein." Held, that where land descends to a widow and a single heir, they are joint owners within the meaning of the Code as amended, and a sale thereof on the ground of indivisibility is fully authorized.

3. **Judicial Sales—Appraisement.**—Where the principal purpose of an action was to obtain a sale of land that descended to a widow and an infant heir on the ground of joint ownership and indivisibility, under section 490, Civil Code, as amended by the Act of 1916, and the court had jurisdiction to order a sale on that ground, the fact that a settlement of the estate of the decedent and the payment of his debts were asked as mere incidents to the main relief sought, did not make the sale coercive in character, so as to require an appraisalment of the property.

JOHN A. JUDY for appellants.

PENDLETON & BUSH, BENTON & DAVIS for appellees.

H. T. LISLE, guardian ad litem.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

E. C. Lisle died intestate and a resident of Clark county, in the year 1917. He was survived by his widow, Carrie A. Lisle, and one child, Elizabeth Buckner Lisle. The People's State Bank & Trust Company duly qualified as administrator of the decedent, and as the guardian of the infant, Elizabeth Buckner Lisle. At the time of his death, the decedent owned a farm of about 300 acres in Clark county and considerable personal property. After applying the personal property to the payment of his debts, there remained unpaid an indebtedness amounting to about \$11,000.00.

This suit was brought by the People's State Bank & Trust Company, as administrator of the decedent and as guardian of the infant, Elizabeth Buckner Lisle, and by Carrie A. Lisle, the widow, against Elizabeth Buckner Lisle and certain creditors of the decedent for the sale of the farm. It was alleged that dower had not been assigned to the widow; that the land was in possession of the widow and the infant; that their estate therein was a vested estate; that owing to its shape and frontage on the turnpike, and the location of the improvements thereon, it was not susceptible of division by laying off dower to the widow, including the mansion house and necessary outbuildings, without impairing its value and the value of the widow's and infant's portions thereof. It was further alleged that the land was not susceptible of division after selling off a portion thereof to pay the decedent's debts, without materially impairing its value, or the value of each parcel thereof, and that the widow was

willing that the farm be sold free from her dower right, and that the cash value of her dower be paid to her. The petition concluded with a prayer that the farm be adjudged to be indivisible either by allotting dower to the widow, or by selling off a sufficiency thereof to pay decedent's debts, without materially impairing its value as a whole, or the value of each parcel in any such division; that it be adjudged necessary to sell the farm as a whole, or to offer same both as a whole and in two parcels and accept the best bid; that the defendant creditors be required to set up their claims, and that the estate be fully settled in the action, etc. Proof was taken, as required by law, fully sustaining the allegations of the petition as to the indivisibility of the land between the widow and the infant heir, and the further allegation that the land could not be divided by allotting dower to the widow, and also cutting off an additional parcel to pay the decedent's indebtedness. A guardian *ad litem* was duly appointed for the infant defendant, and he answered saying that, after an examination of the record, he was unable to make any defense. On final hearing, the court adjudged that the land was indivisible between the widow and the heir, and was indivisible for the purpose of cutting off any part thereof for the payment of debts, and ordered the land first sold in two tracts and then as a whole. When offered in two tracts, the first tract brought \$265.00 an acre, and the second \$140.00 an acre. When offered as a whole, it brought \$295.00 per acre. The purchasers, M. C. Clay and J. W. Clay, excepted to the sale on the ground that the land was not appraised. The exception was overruled and the sale confirmed. The purchasers appeal.

The statute requiring an appraisement applies to all coercive sales for the payment of debts, *Graves, &c. v. Long*, 87 Ky. 441, 9 S. W. 297, but does not apply to sales of land made under section 490, Civil Code, for a division of the proceeds. *Wooldridge v. Jacob's Guardian*, 79 Ky. 250; *Southwick v. Greuzenbach, &c.*, 13 S. W. 918, 12 Ky. Law Rep. 263. Of course, where the sale is coercive, the mere fact that the parties consent to the sale, or other joint owners come in and request a sale of the land as a whole, does not change its coercive character. *Cantrill v. Perry's Admr.*, 7 Ky. Law Rep. 446; *Vivion's Admr.*, et al. v. *Vivion, et al.*, 50 S. W. 984, 21 Ky. Law Rep. 103. Whether an appraisement was necessary in this case de-

depends on whether the sale was coercive. Prior to the amendment of 1916, we held that a doweress and her only child, who owned the fee subject to her dower, were not joint owners within the meaning of section 490, Civil Code, authorizing a vested estate in real property jointly owned by two or more persons to be sold, if the shares of each owner were worth less than one hundred dollars, or the estate was in possession and the property could not be divided without materially impairing its value, or the value of plaintiff's interest therein. *Vanmeter v. Vanmeter*, 160 Ky. 163, 169 S. W. 592. To obviate this difficulty, section 490 was amended so as to authorize a sale, "if the estate shall have passed by devise or descent to the widow and heir or heirs of a decedent, and the widow shall have a life right in a portion thereof, either as a homestead or dower or by devise, and the said property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein." Acts 1916, c. 119, p. 707. Here, the property descended to the widow and a single heir; hence the sale thereof on the ground of indivisibility was fully authorized by the code as amended. The primary purpose of the action was to obtain a sale of the whole farm on the ground of indivisibility and a division of the proceeds, and the proof fully sustains the allegations of the petition.

Since the sale was sought and the chancellor had the jurisdiction to order the sale under section 490 as amended, it seems to us that the fact that the settlement of the estate of the decedent and the payment of his debts were asked as mere incidents to the main relief sought, did not make the sale coercive in character. We therefore conclude that no appraisal was required.

Judgment affirmed.

Bibb v. Daniels.

(Decided March 21, 1919.)

Appeal from McLean Circuit Court.

1. **Adverse Possession—Requisites.**—To acquire title by adverse possession, the possession must not only be actual, but so continued as to furnish a cause of action every day during the whole period prescribed by the statute.

2. **Adverse Possession—Evidence—Sufficiency.**—The occasional cutting of timber, or the feeding of hogs on the land, or the planting of a crop now and then, is not sufficient to show adverse possession.
3. **Adverse Possession—Jury Question.**—Ordinarily, the question of adverse possession is for the jury, but where the facts are admitted, and ordinarily sensible men can draw but one reasonable conclusion therefrom, the question is for the court.

R. W. SLACK and W. A. TAYLOR for appellant.

L. F. TANNER for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

Alleging that he was the owner, and in possession of, a certain described tract of land located in McLean county, and that the defendant, William E. Bibb, had entered thereon and cut and removed certain timber therefrom, and destroyed the fencing on the land, plaintiff, J. P. Daniels, brought this suit to recover damages in the sum of \$1,023.30. Defendant denied the title of plaintiff and pleaded title by adverse possession and by virtue of a patent issued to him by the Commonwealth on March 31, 1914, and prior to the bringing of the action. On motion of plaintiff, the allegation respecting the patent was stricken from the answer. The jury found that plaintiff was the owner of the land in controversy and awarded him damages in the sum of \$75.00. The defendant appeals.

The only way in which title to land may be acquired is by paper title from the Commonwealth, or by adverse possession. *Hellard v. Hubbard*, 160 Ky. 304, 169 S. W. 727. Though plaintiff introduced several deeds extending back over a period of many years, he did not attempt to prove a paper title from the Commonwealth. On the contrary, his case was rested on adverse possession, and this was the only issue submitted to the jury. As bearing on this issue, he introduced a deed from the commissioner dated January 9, 1907, and conveying a certain tract of land to him, Maurice Everly and R. E. Stringer, also a deed from R. E. Stringer and E. C. Bryant to him dated August 10, 1910, together with other deeds not necessary to be set out. On his direct examination he testified that he had been in the actual, adverse and continu-

ous possession of the land since 1907, but stated on cross-examination that he cut some timber off the land in 1907, that a man by the name of Cobb had raised two gardens and potato patches on it in the years 1910 and 1911, that a man by the name of Miller was then raising a crop on it, and that at certain times he had tenants on the land and a saw mill and machinery. R. E. Stringer testified that he and Allen Bryant bought the land in partnership and took possession of the land. In describing the character of his possession, he said, "We cut the timber off and used it whenever we wanted to. Nobody disputed it and I was on it every week. I had some hogs back there and I would go back there and feed them." The rule is, that to acquire title by adverse possession, the possession must not only be actual but so continued as to furnish a cause of action every day during the whole period prescribed by the statute, *White v. McNab*, 140 Ky. 828, 131 S. W. 1021, and the occasional cutting of timber, or the feeding of hogs on the land, or the planting of a crop now and then is not sufficient to show adverse possession. *Courtney v. Ashcraft*, 105 S. W. 106; *Hall v. Blanton*, 77 S. W. 1110; *Muse v. Payne*, 144 Ky. 30, 137 S. W. 788; *Kelley v. Bicknell*, 147 Ky. 401, 144 S. W. 88; *Smith v. Chapman*, 160 Ky. 400, 169 S. W. 834. While, ordinarily, the question of adverse possession is for the jury, yet where the facts are admitted and ordinarily sensible men can draw but one reasonable conclusion therefrom, the question becomes one for the court. *H. F. Davis & Co. v. Sizemore, et al.*, 182 Ky. 680, 207 S. W. 16; *Kentucky Coal Lands Co. v. Wilder*, 165 Ky. 293, 176 S. W. 1155. Here, the evidence shows no continuous use or occupancy of the land. It merely shows that plaintiff and those through whom he claims made only occasional entries on the land for temporary purposes, and was not sufficient to establish title by adverse possession. It follows that defendant's motion for a peremptory instruction should have been sustained.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

Adkins v. Adkins, et al.

(Decided March 21, 1919.)

Appeal from Pike Circuit Court.

1. **Appeal and Error—Finding of Chancellor.**—In an equity case, where the proof is conflicting and upon the whole case the mind is left in doubt as to the truth of the matter, the chancellor's judgment will not be disturbed on appeal. But in this case, where plaintiff seeks a cancellation of the deed upon the ground that he was an infant at the time it was executed, and the preponderance of the testimony shows that he was twenty-one years of age at that time, the judgment of the chancellor so holding will be upheld.
2. **Infants—Estoppel as Applied to Infants.**—The doctrine of estoppel applies to infants the same as to adults; and where one appears to be and represents himself as being twenty-one years of age, and induces another in good faith to believe him of age and to purchase his land, the infant will be estopped from relying upon his infancy to defeat the deed.

W. K. STEELE for appellant.

AUXIER, HARMAN & FRANCIS for W. D. Blair and W. P. McVey.

J. S. CLINE (for William Benge) for appellees.

J. F. BUTLER for Whetsel and Angie Adkins.

OPINION OF THE COURT BY JUDGE THOMAS—Affirming.

The appellant, Orange Adkins, is one of seven heirs of Henry Elza Adkins, who died intestate, a resident of Pike county in 1895, according to the allegations of the petition, but according to the testimony he died in April, 1894. At the time of his death he owned a tract of land in that county containing about 65 acres.

On December 31, 1912, plaintiff executed to his brother, Whetsel Adkins and wife, Angie Adkins, a deed to a one-seventh undivided interest in that tract which he inherited upon the death of his father. Afterward the mineral rights in the tract were sold by Whetsel Adkins and wife to others, and this suit was filed by plaintiff against his brother and wife and the ones to whom they had sold the minerals, seeking a cancellation of the deed which plaintiff had executed to his brother on March 31, 1912; also a cancellation of the deed to the minerals

which his brother and wife had executed, upon the ground that at the time he executed his deed to the brother and his wife he was an infant under twenty-one years of age. In addition, he charged that the deed was procured from him by threats, persuasion, and by his brother overreaching him. He furthermore alleged that the consideration was inadequate.

Answers filed by the defendants put in issue the grounds relied upon in the petition, and in addition pleaded an estoppel against plaintiff's right to the relief which he sought. The case was prepared and submitted, when the court dismissed the petition, and complaining of that judgment plaintiff prosecutes this appeal.

It is conceded by all witnesses that plaintiff was born on the 29th of September, either in the year 1891 or 1892. There was no family bible in which the record of the births of their children was kept by plaintiff's parents, but there was a record made upon a sheet of blank paper which was preserved by being placed in a book and kept in a trunk. Some years before the execution of the deed in question that paper, being much worn, was copied by a young lady in the neighborhood at the instance of plaintiff's mother, upon which occasion the original record appears to have been destroyed. The young lady who made the copy is dead. Neither side introduced or offered to introduce the copy made by her, nor was there any objection to parol testimony concerning its contents or appearance.

The contract for the conveyance of plaintiff's one-seventh interest in the land was made about a year before the execution of his deed, at which time he was paid five-sevenths of the consideration and agreed to execute a deed when he became twenty-one years of age. The brother who purchased plaintiff's interest did not know his own age, or that of plaintiff, both of them relying upon the copied record in the possession of their mother. A shortwhile before the deed was made plaintiff informed his brother, the defendant, that he was then twenty-one years of age, and was prepared to execute the deed, stating that the record in possession of his mother showed him to be of age; he and his brother examined the record and found it to be true that he was born on the 29th of September, 1891. After that time the deed was executed and the balance of the consideration was paid. Plaintiff does not deny these facts, but now claims that

the record had been changed by erasing the figure 2 in the date and substituting therefor the figure 1, so as to make it appear that he was born in the year 1891, when in truth he was born in the year 1892, as he insists the record originally showed.

Plaintiff, his sister, and his brother-in-law, testified that according to their belief a change had been made in the copied record. The sister is not positive that such change had been made, but she and her husband intimate that if it had been made it was done by plaintiff in order to facilitate the collection of the balance of the purchase price agreed to be paid for the land. This insinuation is not denied by the plaintiff. On the other hand, plaintiff's mother testified that he was born on September 29, 1891. She further testified that plaintiff was next to the youngest child; that her youngest is plaintiff's sister, Lora, who is one year, eleven months and twenty days younger than plaintiff, making her birthday September 19, 1893; that the daughter Lora was eight months old at the time of the death of her father.

A witness by the name of Leslie was introduced by defendants, and he testified that he made the coffin in which plaintiff's father was buried; that he made an entry of the date upon which he did that work in a book which he produced and it showed that it occurred in April, 1894, but the day of the month had become so dim he could scarcely read it, but to the best of his recollection it was the 16th of April.

The facts as testified to by the mother concerning the age of her youngest child at the time of her husband's death, and the difference between the age of that child and the age of plaintiff is nowhere disputed by any witness.

It is shown by defendant in his testimony that his and plaintiff's father executed a certain deed on October 6, 1893, and that he died in the spring following the execution of that deed, which would make his death occur in the spring of 1894. If the youngest child was eight months old at that time, and she was one year, eleven months and twenty days younger than plaintiff, it would necessarily follow that the year of plaintiff's birth was 1891, the month and day of the month upon which he was born not being disputed.

Both the mother and defendant deny that any change in the record containing the date of plaintiff's birth was ever made, and defendant says that at the time he accepted the deed and paid the balance of the purchase money he in good faith believed that plaintiff was at that time past twenty-one years of age, although there is testimony to the effect that he had stated that he did not believe plaintiff was twenty-one years of age at that time, which statement he denied. In addition, it appears that plaintiff is married; that he voted in general elections before he executed the deed, and otherwise acted in the community as though he were an adult. From the testimony as we have briefly related it, the chancellor found that plaintiff was twenty-one years of age at the time he executed the deed in question, and therefore dismissed the petition, which judgment we think finds abundant support from the testimony. To say the least of it, in cases of this kind we are not authorized to reverse the finding of the chancellor unless it be against the preponderance of the evidence.

Even if there were a doubt in our minds as to the truth of the matter, it would be our duty to give weight to the finding of the chancellor, since his presumed acquaintance with the parties and knowledge of their surroundings would better qualify him to weigh the testimony and determine the facts than this court would be from a mere reading of the record.

However, were we of a different opinion as to plaintiff's age at the time he executed the deed which he seeks to cancel, we think the facts are sufficient to estop him from insisting upon the fact of his infancy as a ground for cancelling it. This court has uniformly adhered to the rule that the doctrine of estoppel operates against infants the same as against adults; that they are no more privileged to practice fraud upon innocent persons and reap the reward of their misrepresentations than is an adult, and where one deals with them under the bona fide belief that they are twenty-one years of age, and the infant so represents himself to be, he will be bound by his representations. *County Board of Education v. Hensley*, 147 Ky. 441; *Ingram v. Ison*, 26 Ky. Law Rep. 48; *Turner v. Stewart*, 149 Ky. 15, and *Smith v. Cole*, 148 Ky. 138.

In this case, as we have seen, plaintiff represented himself to be twenty-one years of age, claiming to have

obtained that information from the copy of the record of his birth in the possession of his mother; he went with the defendant to examine that paper and his representation was found to be true. He had the appearance of being twenty-one year of age, and had exercised the rights of citizenship allowed only to an adult. Because of such appearances and representations defendant was induced to part with the balance of the consideration agreed to be paid for the land, and plaintiff will not now be allowed, after having spent it and rendered himself unable to return it, to come into a court of equity and cancel his deed, although he was not twenty-one years of age at the time he executed it.

There is no testimony to support the charge of inadequacy of consideration; nor is there any to establish fraud or misconduct on the part of defendant in procuring the deed, and we conclude that the trial court was correct in dismissing the petition.

Wherefore the judgment is affirmed.

Cummins, et al. v. Mullins.

(Decided March 21, 1919.)

Appeal from Rockcastle Circuit Court.

1. **Appeal and Error—Upon What Decisions Are Based.—Decision:** of this court are based upon the records filed and not upon affidavits filed with briefs of counsel.
2. **Judgment—Conflicting Judgments.—Where** there are two conflicting judgments rendered by the same court, upon the rights of the same parties, growing out of the same contract, that which is later in time will prevail.

J. C. CHENAULT and C. C. WILLIAMS for appellants.

BETHURUM & LEWIS for appellees.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Appellee was elected sheriff of Rockcastle county, and appointed appellant, Detroit Cummins, as a deputy; said deputy, on the day of his appointment, executed a bond with J. H. Cummins, T. J. Nicely, Fritz Kreuger and Jonas McKenzie as sureties, under the terms of which the parties bound themselves that said deputy

would faithfully account to and pay over to the proper persons all public moneys or other things coming into his hands by virtue of said office. The sureties further obligated themselves to make good any defalcation on the part of said Detroit Cummins. Said deputy was later removed from office by the appellee and failing and refusing when called upon to make a settlement of his accounts, appellee instituted this suit against said deputy and his sureties, alleging that under the terms of his appointment the said deputy was to receive one-third of the commission for collecting the revenue due the county and state for the year 1914, and was to defray one-third of the expenses of the office; he was also to collect the taxes in the three precincts assigned to him, and be responsible for the collection of all taxes listed on the books in said precincts. Giving him full credit for all returns made and commissions due and charging him with uncollected taxes, and his proportion of the expenses of the office, together with \$38.00 collected on an execution, all of which is set out in the petition, appellee alleged there was due him the sum of \$583.14, for which he asked judgment.

Detroit Cummins was the only one of the several defendants to file any pleadings in the case and, because of their failure to plead, a judgment was entered January 31, 1916, against the four sureties. On March 30, following, appellee tendered an amended petition, notice of which was served on the said deputy, and in which amendment it was alleged that through mistake the original petition stated that the said deputy was entitled to one-third of the commissions of the office, while, as a matter of fact, he was only entitled to one-fourth, and likewise chargeable with one-fourth of the expenses, and therefore he was indebted to the appellee in the sum of \$778.04, instead of \$583.14, as alleged in the original petition. Said deputy filed a general demurrer to the amended petition; exceptions to the report of the commissioner, to whom a reference had been made to ascertain the amount due, and also filed a motion to strike the amended petition from the files. The demurrer and the motion to strike from the files were overruled and the cause again referred to the commissioner, and in the order of reference it is stated that by agreement the affirmative matter of the amended petition could be controverted of record, or a written pleading could be filed

not later than the June term of court. No further pleadings were filed, and in this state of the record the lower court on September 4, entered a judgment in favor of appellee for \$778.04, against Detroit Cummins and the four sureties, all of whom, except Nicely, who was a defendant below, have appealed.

A motion was later made by the defendants to set aside this judgment on the ground that same was void. No affidavits were filed in support of the motion; however, in opposition to said motion the appellee filed certain affidavits, in effect stating that summons had been issued on the amended petition and same had been served on the several defendants, and though the summons was duly served it had become misplaced. The defendants' motion to set aside the judgment having been overruled the defendants prayed and were granted an appeal to this court.

Since the record has been filed in this court a number of motions have been made by both parties. Appellants contend there was no service of process on the amended petition, and, therefore, it has no binding effect upon them. This claim is made in the case for the first time through some affidavits filed in this court with the brief of the appellants on appellee's motion to strike from the files the judgment for \$583.14. This comes too late. It appears from affidavits filed before the appeal was taken that summons on the amended petition was issued and served and no contradictory affidavits were filed. The affidavits now tendered in this court should have been filed before the appeal was taken. We cannot try a case on affidavits. *Carson's Admr. v. Dezarne, etc.*, 28 Rep. 761; *Campbell v. Chitwood*, 164 Ky. 638.

Appellee has filed a motion in this court to strike from the record the judgment for \$583.13, rendered on January 31, 1916, but this motion will have to be overruled. It, too, should have been made in the court below.

We are referred to the case of *Brown v. VanCleave*, 86 Ky. 381, in which it is stated that by the rendition of a final judgment the power of the court is spent except for the purpose of setting aside the judgment or modifying it at the same term as may be provided by the rules of pleading, and the rights of the parties thus settled by the judgment are at an end. The litigated questions as raised by the pleadings are merged in the judgment. To the same effect are *Meadows v. Goff*, 90 Ky. 541; *Harding*

v. Harding, 145 Ky. 315. We do not question the correctness of this rule.

But after this first judgment was entered, and before the filing of the amended petition, the said deputy and his four sureties entered into an agreement with the appellee in which reference is made to the default judgment, and in which it is agreed that "the execution on said judgment shall be returned by the order of plaintiff and no further steps shall be taken to collect said judgment until it is finally determined the amount, if any, that is due the said Cam Mullins (appellee) from the defendant, Detroit Cummins; and it is agreed that whatever amount the final judgment in said action shall be against the defendant, Detroit Cummins, that the said amount shall be the amount the defendants in said action shall owe and shall pay to the plaintiff, Cam Mullins. . . ." This statement is not controverted by anything in the record, and it is evident the parties thereafter practiced the case relying upon this contract. Such is indicated by the later proceedings up to the entry of the second or supplemental judgment for the sum of \$778.04.

Where there are two conflicting judgments rendered by the same court upon the same rights of the same parties, growing out of the same contract, that which is later in time will prevail. 23 Cyc. 1105. Hence this court will treat the first judgment to all intents and purposes as of no binding effect. The appellee is entitled to but one recovery, and his rights and the rights of the appellants shall be fixed and determined solely by the provisions of the judgment entered September 4; this is the only judgment from which an appeal is prosecuted.

The judgment of the lower court is therefore affirmed.

**Taylor v. Albert Shields, John J. Shore and Chicago
Bonding & Surety Company.**

(Decided February 25, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, First Division).

1. **Municipal Corporations—Rights, Duties and Liabilities of Police-men—Arrest.**—A police officer who makes an arrest, without a warrant or other judicial authority, of a person who has not com-

mitted a public offense in or out of his presence, and who the policeman does not have reasonable grounds to believe has committed a felony, is not acting within the scope of his authority as an officer, and the surety on his official bond is not liable for the trespass.

2. Pleading—Action Upon Officer's Bond for Arrest—Sufficiency of Petition.—A petition which alleges that the person arrested was acting in a peaceable and quiet manner; that he had not committed a public offense, either in or out of the presence of the officer; that the officer had no warrant or other judicial authority for arresting the plaintiff, and that the officer did not have reasonable grounds for believing that the plaintiff had committed a felony, does not state a cause of action against the surety in the official bond, although it may state a cause of action against the police officer for the reason that the surety is only liable for the wrongful acts of the policeman done in the performance of a duty devolving upon the officer, and when a warrant is placed in his hands for execution, or a public offense is committed in his presence, and not when the officer acts willfully and maliciously without authority of law in committing the trespass.

CHARLES CARROLL and J. FRANK WITHERS for appellant.

FURLONG, WOODBURY & FURLONG for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Shields and Shore were members of the police force of Louisville in 1916, and the Chicago Bonding & Surety Company was the surety on the official bond of each of said policemen. In October, 1916, this action was filed in the Jefferson circuit court by Taylor against Shields and Shore as policemen, and their surety, the Chicago Bonding & Surety Company, to recover \$5,000.00 for the malfeasance in office of Shields and Shore.

The petition alleges that on the "night of August 29, 1916, plaintiff was arrested by the defendants, Shields and Shore, and was by them detained and confined in the Highland police station, in Louisville, Kentucky, and that while so detained and confined he was assaulted by said defendant officers, and was struck and beaten upon and about his head, body and limbs, and his head, body and limbs were thereby bruised, cut and lacerated and he was caused, by reason of said injuries, great pain and suffering, both physical and mental. Plaintiff says that said assaulting, beating and striking, as aforesaid, was done wantonly and maliciously by the said defendants, Shields and Shore."

On December 9th, following, an amended petition was filed, the material allegations of which are as follows:

"The plaintiff says that each of defendants, Albert Shields and John J. Shore, executed before the 29th day of August, 1916, to the Commonwealth of Kentucky, a bond upon which the defendant, Chicago Bonding & Surety Co., was surety, that he would well and faithfully discharge the duties of his office as a policeman according to law. Said bond was accepted and approved by the Board of Public Safety of Louisville, and was in full force and effect on the 29th and 30th of August, 1916. Certified copies of each of said bonds will be filed herewith, if required.

"Plaintiff says that on the night of August 29th, 1916, he was arrested by the defendants, Albert Shields and John J. Shore, acting as police officers of the city of Louisville; that said arrest was wrongful and without warrant or judicial order, or other authority of law, and at said time plaintiff was acting in a quiet, peaceable and law-abiding manner, and he had not committed any breach of the peace, or committed any offense, either a misdemeanor or felony, in or out of the presence of defendants, or either, and that neither of said defendants had reasonable grounds to believe plaintiff had committed a misdemeanor or felony.

"Plaintiff says said defendants wrongfully and unlawfully, under the circumstances before set out, under their authority as police officers of the city of Louisville, took plaintiff and detained and confined him in the Highland police station, in Louisville, Ky., and while he was detained and confined he was assaulted by said defendant officers and each, and was struck and beaten on and about his head, body and limbs, with great force and violence by said defendants and each, and his head, body and limbs were thereby bruised, cut and lacerated, and he was caused by reason of said injuries great pain and suffering, both physical and mental, and that said beating and striking by said defendants and each was done wrongfully and unlawfully and wantonly and maliciously and at said time he was not resisting arrest by said defendants or either, or by any other officer or any other person, and had not attacked or attempted to attack said defendants or either, or any other officer, and he says at the time, or prior thereto,

he had not committed a felony and had not been arrested for the commission of a felony, and was not attempting to escape arrest, and by reason of said acts defendants and each violated the covenants of the bonds aforesaid executed by each."

To this petition, as amended, the three defendants interposed a general demurrer which was overruled as to the policemen, Shields and Shore, and sustained as to the Chicago Bonding & Surety Company, and the plaintiff declining to plead further, the petition was dismissed as to the surety company, and of this Taylor complains and prosecutes this appeal, seeking a reversal of the judgment, asserting that a surety upon the official bond of a policeman of the city of Louisville is liable for the act of the policemen in committing assault and battery upon a prisoner while confined in a station house by said policeman, after having been arrested by him, there being no effort on the part of the prisoner to escape or to assault the officer.

"An arrest may be made by a peace officer or by a private person. A peace officer may make an arrest (1) in obedience to a warrant of arrest delivered to him, (2) without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." Crim. Code, sec. 36.

"A peace officer in this state, under the provisions of section 36 of the Criminal Code, may lawfully arrest one only in obedience to a warrant delivered to him, or without a warrant if a public offense is committed in his presence, or if he has reasonable grounds to believe that the arrested person has committed a felony." *Morton v. Sanders*, 178 Ky. 839.

"A policeman of the city of Louisville, like any other peace officer, can make an arrest without a warrant only where a public offense is committed in his presence, or he has reasonable grounds for believing that the person arrested has been guilty of a felony." *Madden v. Meehan*, 151 Ky., 220.

"A peace officer can make an arrest without a warrant only where a public offense has been committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony." *Jamison v. Gaernett*, 10 Bush 222.

According to the allegations of the petition as amended, the arrest of Taylor "was wrongful and without warrant or judicial order, or other authority of law, and at said time plaintiff (Taylor) was acting in a quiet, peaceable and law-abiding manner, and he had not committed any breach of the peace, or committed any offense, either a misdemeanor or felony, in or out of the presence of defendants, or either, and that neither of said defendants had reasonable grounds to believe plaintiff (Taylor) had committed a misdemeanor or a felony."

If these allegations be true, and upon demurrer they are so considered, then the acts of the policemen were their individual acts and not their official acts, or acts done by virtue of their office. The policemen had no right to arrest Taylor without a warrant, or other order of a court, unless he had committed a public offense in the presence of the officers, or the officers had reasonable grounds for believing that Taylor had committed an offense. The allegations of the petition show that the arrest of Taylor was made without process of any kind and that Taylor had committed no public offense, either in or out of the presence of the officers. The officers had no writ for Taylor; he had committed no public offense, either in or out of their presence, and they had no reasonable grounds to believe that Taylor had committed a felony. There was, therefore, no grounds for the exercise of their authority as policemen. Where there is a duty imposed by law on a police officer, as when he has in his hands a warrant, or a public offense is committed in his presence, if the duty is neglected, or performed in an improper manner, the surety is liable; but if there is no duty imposed upon the officers, as aforesaid, to make an arrest and the officer voluntarily undertakes to do so, and thereby commits a trespass, the surety is not liable. Whatever the policemen did to Taylor, if anything, was their individual acts and not their official act. In order for the surety to become liable on the bonds of Shields and Shore, their acts must have been done by virtue of their office as policemen, and in order for their acts to have been so done, the acts must have been done in attempting to serve or execute a writ or process, or as a means to that end, or in acting under a statute giving them the right to arrest without a writ or process. If they acted otherwise, and without a writ or other process, and without Taylor having committed a public offense in

their presence, then they acted as individuals and not as officers. If they acted on their individual responsibility they are liable for the trespass as individuals, but the surety on their official bond is not liable, because the act was not an official act, or done by virtue of their offices. "When an officer assumes to act under color of his office, having no writ or process whatsoever, or having process, which on its face, is utterly void, it seems to be the prevailing doctrine that whatever he may do under such circumstances imposes no liability on his surety. To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of, the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond." *Chandler v. Rutherford, et al.*, 101 Fed. 774; *Jones v. Van Bever*, 164 Ky. 80; *Kouns v. Townsend*, 165 Ky. 163; *Jewell v. Mills*, 3 Bush, 64; *Murrell v. Smith*, 3 Dana 463; *Calvert v. Stone*, 10 B. Monroe, 152; *Commonwealth v. Hurt*, 23 Ky. L. R. 1171; *Carson's Admr. v. Dezarne*, 28 Ky. L. R. 761.

"An official bond is not regarded as imposing liability for the purely personal acts of officers not done as a part of or in connection with their official duty, as for example, the receipt of money which it was not the officer's duty to receive, or the arrest of an individual, or the seizure of property without a warrant." 29 Cyc. 1455; 2nd R. C. L. 486.

In the case at bar, no writ had been issued for Taylor, and the officers had no process whatever for his arrest, and he had committed no public offense either in or out of their presence, and, therefore, there was no excuse whatever for his arrest by Shields and Shore. They were not, therefore, acting in their official capacity or by virtue of their office, because they were not armed with a writ for his arrest, and there was no statutes or city ordinances authorizing the arrest of a person who had committed no public offense, without a warrant.

It therefore appears Shore and Shields were acting in their individual capacity and that their surety, Chicago Bonding & Surety Company, is not liable for their will-

ful and wanton trespass, as alleged in the petition as amended, and the general demurrer was properly sustained to the petition as amended, and the plaintiff failing to plead further as to the bonding company, the petition was properly dismissed.

The allegation of the petition that the policemen Shields and Shore were "acting as police officers of the city of Louisville," is a mere description of the person, or a conclusion of the pleader, and does not sufficiently show that Shields and Shore were acting by virtue of their offices at the time of the alleged assaulting and beating of Taylor.

Judgment affirmed.

Crady v. Greer.

(Decided March 25, 1919.)

Appeal from Jefferson Circuit Court (Common Pleas Branch, First Division).

Master and Servant—Servants' Torts—Scope of Employment—Petition—Sufficiency.—Defendant's chauffeur was directed to take defendant's children to a church several blocks distant and then return to defendant's home. After taking the children to the church, he went to a gasoline station to procure gasoline. He was then only a block and a half from defendant's home. Instead of going home, he went to a place several blocks distant to attend to his own business. On his return journey he proceeded about two blocks when his machine collided with plaintiff's machine. He was then almost three times as far from defendant's home as he was when he started on his own journey. Held, that the chauffeur was not acting for the defendant at the time of the accident, but was using the machine solely for his own purposes and that the demurrer to the petition as amended was properly sustained.

WALTER L. LAPP for appellant.

ELMER C. UNDERWOOD for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Plaintiff, Wood Crady, brought this suit against defendant, Frank T. Greer, to recover damages for injuries to his automobile, caused by a collision with an automo-

bile owned by defendant and operated by defendant's chauffeur. A demurrer was sustained to the petition as amended and the petition dismissed. Plaintiff appeals.

It appears from the petition as amended that defendant lives at 1133 South Third street, in the city of Louisville. On March 4, 1917, defendant's wife directed defendant's chauffeur to take defendant's automobile and convey defendant's children to the Warren Memorial church, situated at Fourth and Broadway, and then to return to defendant's home. Pursuant to these directions, the chauffeur did take the automobile and convey the children to the church. Thereupon, the chauffeur drove the machine to Third and Kentucky streets, a point near defendant's home, for the purpose of procuring gasoline for the operation of the car. After getting the necessary gasoline, he then drove the machine in the opposite direction to First and Broadway, for the purpose of securing an attendant for his wife, who was then sick. After accomplishing his purpose at First and Broadway, he then proceeded south on First street for the purpose of returning to defendant's home. When he reached the intersection of First and Breckenridge streets his machine collided with plaintiff's machine, which was then being driven west on Breckenridge street, and it is alleged that the accident was due to the negligent operation of defendant's machine.

The liability of the defendant depends on whether the chauffeur was acting for himself or for the defendant. When the chauffeur reached the gasoline station at Third and Kentucky streets he was then only a block and a half from the home of the defendant, where he had been instructed to go, and his journey was practically completed. Instead of going to defendant's home, he turned the machine around and drove it in the opposite direction to First and Broadway, several blocks distant, solely for the purpose of attending to his own business. When the accident occurred, he was still three blocks and a half from defendant's residence. It is apparent that this is not a case of a mere deviation from the direct route, but a case where the chauffeur had practically completed the service which he owed to his master and went on an independent journey of his own, having no connection whatever with his master's work. The chauffeur had not resumed the service merely because he had accomplished his purpose at Third and

Broadway and was returning to the defendant's home when the accident occurred.

He was then almost three times as far from the defendant's home as he was at Third and Kentucky streets, when he abandoned the service of his master and started on the trip to First and Broadway. We therefore conclude that he was still using the machine solely for purposes of his own, and was not acting for the defendant when the accident occurred. *Eakin's Admr. v. Anderson*, 169 Ky. 1, 183 S. W. 217; *Tyler v. Stephan's Admx.*, 163 Ky. 770, 174 S. W. 790; *Healey, &c. v. Cockrill (Ark.)*, 202 S. W. 229.

It follows that the demurrer was properly sustained. Judgment affirmed.

Lyle, et al. v. Purdy, et al.

(Decided March 25, 1919.)

Appeal from Marion Circuit Court.

Deeds—Religious Societies—Acquisition of Property—Reversion.—In the year 1804, grantor conveyed to the trustees of the Presbyterian congregation two acres of land "for the purpose and use of a Presbyterian meeting house and for no other purpose whatsoever," the deed providing that when "the said Presbyterian meeting house ceases to be continued for the aforesaid purpose, the said trustees, or their successors, do oblige themselves to convey the aforesaid two acres to said William Purdy, or his heirs, for the same sum they now pay for the land." In 1854, the trustees acquired two adjoining lots and erected a church building on those lots and partly on the land in controversy. Held, that the trustees had the right to locate the meeting house on such portion of the land in controversy as they saw fit, and that so long as any portion of that land was occupied by the meeting house, the title did not revert to the grantor or his heirs.

T. L. EDELEN and S. A. RUSSELL for appellants.

PROCTOR K. McELROY and C. C. BOLDRICK for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

In the year 1804 William Purdy, for the consideration of five shillings, conveyed to John McElroy, John Muldraugh and George Ewing, trustees for the Presbyterian congregation on the head of Hardin's creek, two acres

of land, now in Lebanon, "for the purpose and the use of a Presbyterian meeting house, and for no other purpose whatsoever."

The deed further provided that when "the said Presbyterian meeting house ceases to be continued for the aforesaid purpose, the said trustees, or their successors, do oblige themselves to convey the aforesaid two acres to the said William Purdy, or his heirs, for the same sum they now pay for the land."

At the time of the conveyance, there was a meeting house on the land and two other meeting houses were subsequently erected. In the year 1854 the church purchased two adjoining lots on another street, and in the year 1855 the present church building was completed. Nearly all of this building is located on the two adjoining lots.

In the year 1916 R. L. Purdy and others, heirs of William Purdy, the grantor, brought this suit against the trustees of the church to recover the two acres of land, on the ground that the land had ceased to be used for purposes of a meeting house. On final hearing, the chancellor granted the relief prayed for and the trustees appeal.

It was not contemplated by the parties to the original conveyance that the entire two acres of land should be occupied by a meeting house. The trustees had the right to locate the meeting house and to use such portions of the land for that purpose as they desired. So long, therefore, as any portion of the lot is occupied by the meeting house, it cannot be said that the lot has ceased to be used for the purpose of a meeting house. In order for plaintiffs to recover, it was necessary to show that the present meeting house was located entirely on the adjoining lot. The evidence that this is the case is by no means satisfactory, and upon a consideration of all the evidence we are inclined to the opinion that a portion of the church building erected in 1858 is located on the land in controversy. Under these circumstances, the land did not cease to be used for the purposes of a meeting house, and it was error to adjudge that the title had reverted to plaintiffs as the heirs of the original grantor.

Judgment reversed and cause remanded with directions to enter judgment in conformity with this opinion.

Standard Fire Insurance Company v. Smithhart.

(Decided March 25, 1919.)

Appeal from Henderson Circuit Court.

1. **Witnesses—Attorney and Client—Privileged Communications.**—Although the relationship has ceased between them, an attorney cannot testify as to communications made to him in his professional character without the consent of his client.
2. **Witnesses—Attorney and Client—Privileged Communications.**—In an action against an insurance company for the loss of her property by fire, the defense being that appellee procured the house and contents to be burned for the fraudulent purpose of collecting the insurance, it was permissible to prove a communication made by her in reference to her connection with the burning of the house by the attorney to whom the communications were made, such communications not having been made to the attorney in his professional capacity, and therefore not privileged.

JOHN C. WORSHAM for appellant.

McCLAIN & PENTECOST for appellee.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

The appellee, Sallie Smithhart, owned a house, in Henderson, upon which and its contents, she carried four insurance policies, in the appellant Standard Fire Insurance Company, which insured her against damages, by fire, to the house and contents insured. The larger part of the house and its contents, were destroyed, by fire, and the appellant, company, having refused to pay the damages, she instituted this action against the insurance company, upon the policies, to recover the damages. The trial resulted in a verdict of the jury in her favor, and a judgment of the court, in accordance with the verdict. A motion for a new trial was made and denied, and the insurance company appeals.

The only ground upon which a reversal is sought, is that an error prejudicial to the substantial rights of the appellant was made by the trial court, in excluding from the jury, certain evidence offered by the appellant. One of the grounds, relied upon, by the appellant, in the defense of the action, was, that the burning of the house and goods, was not accidental, but, was of incendiary origin, and that the appellee procured the house and contents to be burned, with the fraudulent purpose of

collecting the amount of the insurance, carried upon the house and its contents. This plea was denied by a reply. Upon the trial, the appellee stated, that she was not at home, at the time, the house was burned, but had left her house, on the evening before, at about 4:30 o'clock and had gone to Evansville, Indiana, for the purpose of seeing a physician; the house was burned, during the following night; she left the house in charge of the caretaker, with directions to close the window shutters and to lock the doors of the house; that some days previous to the time mentioned, one Gus Stevens came to the door of her house, to ask if she desired any painting to be done; that after her return to her home, she engaged the services of an attorney, to prepare the proofs of the loss, and to collect the insurance, and thereafter, the attorney informed her, that the company declined to pay the damages, upon the ground, that she had burned the property; the policies were then returned to her, by the attorney, and she, thereafter, secured other attorneys and instituted the suit. The chief, of the fire department of the city, testified, that he arrived, at the place of the fire, within a few minutes after the alarm had been given, and the house was then ablaze within, and the shutters to as many as two windows, upon one side of the house, were fastened, by nails, driven through the foot of the shutters. The caretaker testified, that he closed the shutters between three and four hours before the fire, but did not fasten them with nails. The house was discovered to be on fire, about one o'clock in the night. The attorney, whom appellee had at the first employed, was called as a witness by the appellant, and his employment by the appellee and that he had prepared the proofs of the loss, and his services engaged to collect the insurance upon the policies by suit, if necessary, and his submission of the proofs to the company, and its refusal to pay the damages was proven by the attorney. The appellant then offered to prove, by the attorney, that he informed the appellee of the refusal of the company and the ground, upon which it based its refusal and that she stated to him, that she did not burn the house, nor have anything to do with its being burned, but, that at a time before it was burned, John Puckett, suggested to her, that as the business, in which she was engaged was dull, it would be a good scheme for her to have the house burned, and that he would at-

tend to the burning of it for her; she said to Puckett, that she would not have anything to do with setting it on fire, but, he said, that if she would let him know of a time, when she was going to leave town, he would attend to the matter, and for her, to call him up; that Puckett said further, that he would send Gus Stevens to her house, and that Stevens would come with a paint bucket and ask to be shown the house and for her to let him see the house, and then telephone to him (Puckett) when she was going to be out of the town, and the house would be burned, whilst she was out of the town, and that on the afternoon, preceding the night, upon which the house was burned, and before she left for Evansville, she telephoned Puckett, that she would leave for Evansville that night and would spend the night in Evansville, and that the house burned during that night. Upon the objection of appellee, the court refused to allow the attorney to make the statements, above stated. It was then offered to be proven, by the attorney, that the appellee directed him to deliver the policies sued on, to the attorneys for the company, for the purpose of being cancelled, and that in accordance with this direction he did deliver the policies to the attorneys for the company, who promised, that no criminal prosecution should be instituted against her, but, in a short time, the attorneys, for the company, returned the policies to the witness, with an explanation, that because of a disagreement between them and the company, they did not represent the company any further, and that witness could collect the policies, if he desired, and that he then, returned them to the appellee. The above proposed statements were, also, excluded, upon the objection of the appellee.

So far as the offered evidence, was a statement of conversations, or communications or agreements, between the attorneys of the company and the witness, they were properly excluded upon well known grounds, but, as regards the statements of the appellee made to the attorney, and which were offered to be proven by him, a question is presented, which has not, heretofore, been determined, in this jurisdiction. The witness, at the time, the statements were made to him, by appellee, was representing her, in his professional capacity, as an attorney, with reference to her claim, under the policies, against the insurance company, and the statements, made by her,

directly related to the nature of her claim and her legal rights, with reference to same. The common law had a rule, which determined the right of an attorney to give evidence touching statements made to him by his client, when such were made to the attorney, in his professional character, and the advice of the attorney thereon, and the subject is now governed by the provisions of subsection 4, section 606, Civil Code, which is said to be a declaration of the common law upon that subject. The Code provisions, *supra*, are as follows:

“No attorney shall testify concerning a communication made to him in his professional character, by his client, or his advice thereon, without the client’s consent:

.. .”

Touching all matters, an attorney is a competent witness and is privileged to testify, either for or against his client, except as to communications made to him, in his professional character, by his client, and as to such, he can not testify, without the consent of the client, although the relationship has ceased between them. As said in *Carter v. West*, 93 Ky. 211, “the seal of silence is upon it”—such communication—“subject to be broken by the consent of the client only.” Hence, the matter for decision, here, is whether the communications, offered to be proven, were made to the attorney in his professional character. It is gathered from the text books and authorities, that there are many communications, which a client may make to an attorney, and touching the matter about which the attorney is employed or consulted, which are not made to him, in his professional character, and often times for the reason, that they are communications, which the attorney can not receive in his professional character, and sometimes, as to whether the communication is privileged, depends upon the parties to the controversy, in which he is called, as a witness, to testify concerning the communications. As an instance, where one has been the legal adviser, at the same time and about the same matter for two persons, the statements made to him by either of them, in the presence of the other, are not privileged communications, in a controversy with each other, though they are privileged, in a contest between them, and other persons. *Rice v. Rice*, 14 B. M. 135; *Smick v. Beswick*, 113 Ky. 439. The principle, upon which this rule is based, is that the com-

munications, in such a state of case, are not given nor received in confidence, as to the parties themselves. A communication made by a client to his attorney, for the purpose of having it communicated to another, is not privileged. *List, et al. v. List, etc.*, 26 K. L. R. 691. As an instance of the character of communications which can not be given to nor received by a lawyer, in his professional character, are communications made to a lawyer by persons, who are contemplating the commission of crimes, or the perpetration of frauds, and who seek the advice of the lawyer, as to how the crimes or frauds contemplated, may be committed, and how the consequences of them may be avoided. The reason of the principle, which holds such communications not to be privileged, is that it is not within the professional character of a lawyer to give advice upon such subjects, and that it is no part of the profession of an attorney or counselor, at law, to be advising persons, as to how, they may commit crimes or frauds, or how, they may escape the consequences of contemplated crimes and frauds. If the crime of fraud has already been committed and finished, a client may advise with an attorney in regard to it, and communicate with him freely, and the communications can not be divulged as evidence, without the consent of the client because it is a part of the business and duty of those engaged in the practice of the profession of law, when employed and relied upon for that purpose, to give advice to those, who have made infractions of the laws; and to enable the attorney to properly advise, and to properly represent the client in court, or when prosecutions are threatened, it is conducive to the administration of justice, that the client shall be free to communicate to his attorney all the facts within his knowledge, and that he may be assured, that a communication, made by him, shall not be used to his prejudice. While the general rule, which applies to communications made by a client to his attorney, in his professional capacity, and his advice thereon and to information acquired by an attorney from his client, or touching his client's affairs, concerning matters about which he is employed, in his professional capacity, is, that, he can not, and will not be permitted to give evidence touching such matters without the client's consent, but, the exception, touching communications to an attorney concerning crimes and frauds, which the client

has in contemplation, and in furtherance of which he makes the communications, is as broad as the rule itself. The exception as stated by Thornton on Attorneys, vol. 1, 214, is: "Where an attorney is consulted for the purpose of obtaining advice as to the perpetration of a fraud, or in aid or furtherance thereof, the communications, made to him, by one having such purpose in view, are not privileged."

In Chamberlyn, vol. 5, 5280, it is said: "The protection, which the law affords to communications between attorney and client, has reference to those, which are legitimately and properly within the scope of a lawful employment. It does not recognize those, which may be made in connection with and an aid to the accomplishment of a criminal purpose. It is the duty of an attorney, in the eyes of the law, to act in conformity with the laws in force and in no way endeavor to violate them, or to aid, in their violation."

In 40 Cyc. 2373, the exception is defined, as follows: "The rule does not extend to communications respecting proposed infractions of the law, and so there is no privilege as to communications made in contemplation of the future commission of a crime, or perpetration of a fraud, in which, or in avoiding the consequences of which, the client asks the advice or the assistance of the attorney. But, communications in respect to an alleged crime or fraud made after the act or transaction is finished are privileged."

While the decisions of the courts, in the various jurisdictions, have not been, altogether, harmonious, as to the soundness of the exception above stated, it is sustained by the weight of modern authority, and is consistent with the purposes of the general rule, which is to aid the dispensing and administration of justice, and not the dispensing of injustice. *Matthews v. Hoagland*, 21 Atl. 1054; *Orman v. State*, 6 S. W. 544; *State v. Faulkner*, 175 Mo. 546; *Hickman v. Green*, 123 Mo. 165; *Hyman v. Grant*, 102 Tex. 50; *Taylor v. Evans*, 29 S. W. 172; *Collins v. Hoffman*, 113 Pac. 625; *Dudley v. Beck*, 3 Wis. 274; *Dunn v. Amos*, 14 Wis. 106; *Hamil v. England*, 50 Mo. App. 338; *Stone v. Stinnett*, 121 S. W. 187; *Supple v. Hall*, 96 Am. St. Rep. 188; *Rex v. Cox*, 142 B. D. 153. In the instant case, the communications avowed to have been made by the appellee to her attorney, tended to prove, that she had procured her house to be burned,

but it was not permissible to prove her communications, over her objections, for that purpose, in this action, but, the fact, of having procured the burning of her house, she was then seeking to defraud the insurance company, by pretending, that the burning was accidental, or done without her participation, and thus to enable her to recover the insurance by fraud, and that she had employed the services of the attorney to assist her in doing so, and the communications were made to him for his advice and in furtherance of her contemplated fraud, renders it permissible to prove the communications made by her in reference to her connection with the burning of the house by the attorney to whom the communications were made. Such communications were not made to the attorney, in his professional capacity, as they were such, as he could not receive in such capacity, and therefore, were not privileged. Hence, the trial court erroneously excluded, from the jury, so much of the testimony of the attorney, as would detail the communications made to him, by appellee, touching the connection which she had with the burning of the house, but, the other statements proposed to be made by the attorney, were properly excluded.

The judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

A. R. Humble Stave & Lumber Company v. Dunbar, et al.

(Decided March 25 1919.)

Appeal from Russell Circuit Court.

Appeal and Error—Trespass—Evidence.—In an action in trespass to recover for timber taken, injury to growing timber and damage to land by reason of roads made thereon, the trespass being admitted, the only questions are value of the timber taken, damage to the growing timber and land by reason of the roads, and when this question is properly submitted to a jury, its verdict will not be disturbed unless palpably against the weight of the evidence.

LILBURN PHELPS and **J. N. MEADOWS** for appellant.

T. Z. MORROW and **EDWIN P. MORROW** for appellees.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Abner Perkins died testate, a resident of Russell county and the owner and in possession of a tract of about 325 acres of land, of which he willed 150 acres absolutely to his wife, Elizabeth Perkins, and the balance in remainder after the death of the widow to Lou Ettie Fox, who is the mother of appellee, Surrilda Dunbar. About nine or ten years before the commencement of this action the lands were divided between the widow and appellee and a line established, cutting off 150 acres from the north end of the land for the widow, of which she took possession, and the remainder of the land was turned over to the possession of appellee Dunbar and her father, with whom she lived. The division line was well marked. Some time after the division of the land, the widow sold her 150 acres to one Sidney Holt, who took possession of it as a home and farm. A short time before the bringing of this action Holt sold the white oak and black oak timber on his tract of land to the appellant, Humble Stave & Lumber Company, a partnership of which A. R. Humble is the manager and principal owner. At the time Humble purchased the timber he was shown the division line between the tract willed to the widow and that devised to the mother of appellee, and Humble, who happened to have a bucket of paint with him, painted the division line so as to definitely fix it and prevent a trespass by crossing the line in cutting the timber. Some days later Humble obtained the services of John Mitchell, a surveyor, to go on the lands with the avowed purpose of re-surveying the tract and establishing a new line. To this appellee, through her father, objected. Mitchell was the same surveyor who had laid off the 150 acres to the widow in the first instance and established the division line. In running it the last time, however, he marked a line several poles further south than the old line, thus taking into the widow's part some 18 or 20 acres more and that much from the lands of appellee. This part of the land was covered with very fine timber, and Humble and his employes entered on this strip in controversy and cut and removed 187 white oak trees and 39 black oak trees and injured much young growing timber and made roads over and across it to the damage of appellee. To recover for these trespasses this action was instituted in the Russell circuit court

by Surrilda Dunbar by her father as next friend, she being less than twenty-one years of age, against A. R. Humble Stave & Lumber Company.

On a trial of the facts before a jury a verdict for \$1,250.00 for the timber and damages to the land was returned in favor of the appellee Surrilda Dunbar, and judgment being accordingly entered, the stave company appeals.

The trespass is admitted, the second survey made by John Mitchell, in which he laid off more land to Humble and Holt, is confessedly erroneous, and the answer offers to pay the reasonable value of the timber taken, but denies that the land was injured by the roads made across it or that the growing timber was injuriously affected by the removal of the other timber.

The evidence for the appellee tends to establish the value of the timber and damage to the land at about \$1,600, while that for the appellant stave company fixes it at about \$450.00. The instructions of the court were very brief, but we think fairly submit the issues.

As the trespass was admitted, it was only a question of the value of the timber and the extent of the damage to the land. If there was sufficient evidence upon the part of the appellee to warrant the jury in finding for the plaintiff, and the issues were properly submitted to the jury, there is no available ground for complaint unless the verdict is so excessive as to impress the mind that the verdict was given under the influence of passion or prejudice. This we do not think is true. Appellants admit that the verdict should have been at least \$400.00 or \$500.00, but if the timber, as it stood on the land, was of the value which the witnesses testifying for appellee fixed it, then \$1,250.00 was none too much when considered in connection with the damage to the growing timber and the land by reason of the roads.

Apparently from this record appellant willfully went upon the land and took the timber in controversy. In such case quite a different rule prevails from that in cases where the trespasser acts in good faith and with the honest belief that the timber taken is his property; but we need not consider that question because there is no cross-appeal.

Appellant insists that the timber was taken from about nine or ten acres of land, and that at the rate fixed by the jury the timber on the farm would bring about

\$18,000.00, whereas the value of the farm, as estimated by appellant, is only about \$5,000.00. All this may be true, and yet it is not conclusive of the controversy. This particular boundary of timber appears to have been of a superior quality and size. The timber on the balance of the farm may have been very different. The jury heard the facts and concluded from the evidence that the timber taken by appellant and the damage done by roads, etc., amount to \$1,250.00, and we find no reason to disagree with the verdict.

Judgment affirmed.

Bingham v. Commonwealth.

(Decided March 25, 1919.)

Appeal from Pike Circuit Court.

1. **Homicide—Voluntary Manslaughter—Plea in Bar.**—Where one of two persons, jointly indicted for the crime of willful murder, is found guilty of voluntary manslaughter, the other defendant can not plead that judgment in bar of the right of the Commonwealth to try him for murder, even though the one first convicted fired the fatal shot and the second defendant was only present aiding and abetting.
2. **Homicide—Manslaughter.**—Where two persons are jointly indicted for the crime of willful murder, one may be guilty of murder and the other of manslaughter only. If the one who fires the shot which causes the death acted in sudden heat of passion or in sudden affray and without previous malice, he will be guilty of manslaughter only, while the other who did not fire a shot but was present, aiding, encouraging and abetting the crime, will be guilty of willful murder, if he acted with malice aforethought.
3. **Criminal Law—Evidence.**—Where there is evidence for the Commonwealth sufficient to warrant the verdict of the jury, it will be sustained notwithstanding the evidence for the defendant is in conflict therewith, the jury being the judges of the facts.

J. J. MOORE and W. K. STEELE for appellant.

CHARLES H. MORRIS, Attorney General, and BEVERLY M. VINCENT, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

The grand jury of Pike county returned an indictment in February, 1918, accusing Mosco Belcher and E. S. Bingham of the willful murder of Nelson Matney.

Shortly thereafter Bingham moved for a severance of trial, which was granted, and the Commonwealth elected to try Belcher first. At the spring term, 1918, Belcher was put upon trial and the jury returned a verdict finding him guilty of manslaughter and fixing his punishment at confinement in the state penitentiary for twenty-one years. Judgment was entered thereon, from which Belcher appealed to this court, and that judgment was affirmed. *Belcher v. Commonwealth*, 181 Ky. 516. At the September term of court appellant Bingham was placed upon trial and the jury returned a verdict finding him guilty of voluntary manslaughter and fixing his punishment at fourteen years in the state penitentiary. Motion and grounds for new trial were filed and overruled, judgment entered and appeal granted to Bingham.

Appellant asks a reversal upon two grounds only: (1) The court erred in its instructions to the jury in that it submitted to the jury the question of the guilt of appellant of the crime of willful murder, whereas, appellant asserts it had been judicially determined in the Belcher case that the principal, Belcher, was guilty only of voluntary manslaughter, and Bingham being only an aider and abettor could not therefore have been guilty of any crime greater than voluntary manslaughter, if anything. (2) The evidence was not sufficient to warrant the court in submitting the case to the jury and the court should have sustained appellant's motion for a directed verdict in his favor at the conclusion of the evidence.

In the opinion in the Belcher case the facts are admirably set forth, and we will but briefly recite them so as to enable one to better understand the application of the principles of law which we conceive to control this case.

The homicide occurred on Sunday, December 16, 1917, at the home of the deceased in Pike county; appellant Bingham and the deceased Matney were brothers-in-law, but they had quarrelled some years before and were not friendly at the time of the killing, nor had they been for several years. Belcher had been paying attention to Jane Matney, the nineteen year old daughter of the deceased, and Matney objected to this and had threatened to run Belcher off if he came to his house again. This had been communicated to Belcher by Jane, and Belcher had not been to Matney's house for two months next

before the killing. Both Belcher and Bingham were unfriendly to Matney, but Bingham and Belcher were intimate friends. On the afternoon of the Sunday on which Matney came to his death, Bingham and Belcher met by appointment on the road near Slone's store; they claim to have transacted some slight business between them. Thereafter they went to the store operated by Slone where they met several other persons. The store was open and they bought four or five bottles of "hot drops," which they mixed with cider and whiskey and drank. They became more or less intoxicated and were dancing in the store; Bingham and Belcher used expressions between themselves, indicating that they had some secret expedition on hands, the exact meaning of the words being unknown to the other persons in the store. Matney lived a short distance down the river from the store, and Bingham and Belcher spoke of their destination as being down the river. About dark Bingham and Belcher and another man left the store and started down the road; after going only a short distance a pistol shot was heard which came from the three in the road, but appellant Bingham claims not to know who fired the shot, although he admits it was fired by one of his companions. The third man returned to the store, but Bingham and Belcher proceeded down the road. They contend that they had started to the home of Belcher to have supper; but when they reached the forks of the road they turned in the direction of the home of Matney instead of towards Belcher's home. Each knew that he was not welcome at Matney's home, and that Matney did not like them and they did not like him. In approaching the home of Matney they passed the barn where Matney was milking his cow. Without stopping with him they went immediately to the house; entering the front door, Belcher walked into the kitchen where his sweetheart, Jane, was cooking supper. Bingham, according to Bert Matney, the twelve year old son of the deceased, stopped in the front room by the dresser and said to Bert, "Your pa don't want me here, does he?" Very soon after Belcher reached the kitchen and began a conversation with Jane, Nelson Matney walked in and asked Belcher what business he had there, to which Belcher answered, "I have a little," whereupon Matney ordered Belcher to leave the house, and Belcher said he would go out when he got ready. Bingham was in the front room and

within hearing of Matney and Belcher at the time; Matney turned and came into the hall to get his shotgun, and Belcher seeing this, went out at the kitchen door and around the house towards the front gate; about the same time Bingham left the front room and went towards the front gate, where he met Belcher; Matney came around to the gate with the shotgun in his hands; he and Bingham began to quarrel and to call each other bad names; in the meanwhile Belcher had crossed the road, gaining the elevation beyond, and was some 130 to 150 feet away; while Bingham and Matney were cursing and quarreling, Bingham called Matney "a son-of-a-bitch," whereupon Matney told Bingham not to call him that again; or dared him to call him that again; about this time Belcher fired two shots from a pistol at Matney, who was inside his yard fence. Bingham, who was standing just on the outside of the fence near the gate, continued to quarrel with Matney, and an instant later a third shot was fired by Belcher which struck Matney's vitals and he turned towards the house and fell across his gun, dead. Both Bingham and Belcher left the scene immediately, although no one was there to take care of the dead man except his nineteen year old daughter and twelve year old son. The daughter remained with the body while the little boy ran for help. Bingham and Belcher fled into Virginia, where they were afterwards arrested and returned to Kentucky for trial.

One witness testified that only a few days before the killing Bingham had said that Matney was a hard man to get along with; that he had had a quarrel with him some four or five years before and that if he had had a gun at that time he would have killed Matney, and that it was not yet too late. Another witness gave evidence that Bingham had recently attempted to borrow a pistol, and there were several witnesses who gave testimony to the effect that Bingham disliked, if he did not hate, Matney. Bingham had not been to the home of Matney for about two years, and then Matney was not at home. According to some of the witnesses they frequently met and passed without speaking. The theory of the Commonwealth is, that after Belcher and Bingham met on the afternoon before the killing, they entered into an agreement or conspiracy, either expressly or tacitly, to intimidate and alarm their common enemy, Matney, and after nerving themselves for the job by

drinking a concoction of whiskey, cider and "hot drops," proceeded with the execution of their design.

Appellant's contention is that he was an innocent bystander, wholly unconnected with any plan or conspiracy to injure or bring about the death of Matney, and that he did not anticipate any trouble on his visit to the home of Matney; that the shots by Belcher were fired in sudden heat of passion without previous design even, on Belcher's part, and that he (Bingham) had no opportunity to prevent Belcher from firing the shots.

(1) Instruction "A," given by the court, defines the words "willful," "malice aforethought," "felonious" and "feloniously," as used in the instructions, and there is no objection to the form or substance of the definitions, but only that a definition of "murder" and "malice aforethought" was not relevant to the facts of this case, especially since Belcher, whom appellant asserts was the principal if not the sole perpetrator of the crime, had been judicially determined to be guilty only of voluntary manslaughter. Instruction "B" directed the jury to find the defendant guilty of willful murder, if it believed from the evidence beyond a reasonable doubt that the defendant, Belcher, willfully and feloniously shot and killed Matney at a time when it was not necessary in order to protect himself or Bingham from death or the infliction of some serious bodily harm, and that Bingham was then and there present and near enough to and did unlawfully, willfully, feloniously and with malice aforethought, aid, assist, abet, encourage, advise, counsel or command Belcher to so shoot and kill Matney. The same instruction told the jury that if it believed from the evidence, beyond a reasonable doubt, that defendant Belcher shot and killed Matney in sudden heat of passion or sudden affray and without previous malice, and that Bingham was present and near enough to and did unlawfully, willfully and feloniously aid, assist, encourage, advise, counsel or command Belcher to so shoot and kill Matney, the jury should find the defendant Bingham guilty of the crime of voluntary manslaughter, and fix his punishment at confinement in the penitentiary not less than two nor more than twenty-one years.

Appellant insists that as he is not charged with firing the shot or striking the blow which killed Matney, he could, therefore, be only an aider and abettor in the

crime, if anything, and as Belcher had previously been tried and found guilty of voluntary manslaughter only, the aider and abettor could not be guilty of a greater crime, and, consequently, the instruction directing the jury to find the appellant guilty of murder if it believed certain facts to exist, was palpably erroneous.

Had the jury found defendant guilty of murder there might have been some basis for this contention, if the facts had only justified a verdict of voluntary manslaughter, but since the verdict is only for manslaughter, and not under the instruction on murder, appellant's insistence is without force because the error, if it had been such, was not prejudicial, the jury having disregarded the instruction upon murder.

It is a well-settled principle that an aider and abettor may be guilty of willful murder, while the one who fires the shot or strikes the blow which takes the life, may be guilty only of manslaughter. If Bingham secretly designed to bring about the death of Matney, and in furtherance of his plan induced Belcher to accompany him to the Matney home on the occasion of the homicide and thus provoked and brought about the difficulty, which he further fomented by remaining at Matney's gate and quarreling and abusing him until Belcher, who had run off some distance, was so encouraged and abetted that he began to fire at Matney, and Matney's death resulted directly from the designing aid and encouragement of Bingham, though Belcher acted in sudden heat of passion, Bingham would be guilty of willful murder though Belcher was guilty only of voluntary manslaughter. *Parker v. Commonwealth*, 180 Ky. 102; *Mickey v. Commonwealth*, 9 Bush 596; *Dorsey v. Commonwealth*, 17 S. W. 183; *Arnold v. Commonwealth*, 55 S. W. 894.

This is not a new principle, but was anciently stated as follows: "If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, and malice in the abettor, it will be murder in the latter though only manslaughter in the former."

We, therefore, conclude that the court properly instructed the jury upon the law of murder.

(2) Equally without merit is the contention of appellant that the evidence does not sustain the verdict

of the jury and judgment of the court. Of course, the evidence offered on behalf of appellant does not sustain the verdict, and if the jury had considered it entitled to credibility, no doubt the appellant would not have received so severe a punishment. The evidence for the Commonwealth was sufficient to justify the jury in believing beyond a reasonable doubt that Bingham's heart rankled with hatred for Matney and that he designedly went with his confederate Belcher to the home of their common enemy for the purpose of precipitating trouble. The jury was the trier of the facts. It had the right to reject the evidence of appellant and to accept that of the Commonwealth as true. Had it accepted the evidence offered by appellant as true, it would have reached a different conclusion, and defendant no doubt would have been acquitted of the charge. There was a conflict in the evidence and this was correctly submitted to the jury. The trial court, therefore, properly overruled the motion of appellant for a peremptory instruction.

It is insisted by appellant that all the evidence concerning what took place between appellant and Belcher and other persons at Slone's store immediately before the killing, as well as what was said and done by Bingham at the house of Matney before the difficulty was incompetent upon this trial, and should have been excluded. No good reason can be advanced for such a ruling. It may be that Belcher escaped the just penalties of the law, but it does not follow that Bingham, who beyond question incited the difficulty, and encouraged the firing of the shots, should profit by it. Counsel for appellant insists that he is a victim of circumstances—yes, circumstances which he fathered. The enmity which he bore his brother-in-law found friendly companionship in the hate of Belcher for Matney, and when these hostile spirits were incited and energized by the concoction of whiskey, cider and hot drops, both Belcher and Bingham, who, when separate, and not incited, secretly nursed their wrath, were emboldened to visit the home of Matney to insult and humiliate him if not to do him bodily harm. Whatever was their mission to the house of Matney, it can not be doubted that it was unfriendly to him, and while they may not have planned his death, they did purpose to defy his will, overcome his home discipline and to humiliate him; and if while in the execution of this unholy plan Matney was killed, appellant is in no posi-

tion to complain that the original design was less than murder.

Some slight errors occurred upon the trial by the introduction of incompetent evidence of which appellant complains, but after carefully examining the record with respect to each of the complaints, we are persuaded that his substantial rights were not prejudiced thereby.

The court is of opinion that the facts fully justify the conclusion of the jury, and there appearing no error to the prejudice of the rights of appellant, the judgment is affirmed.

Taylor v. Wilson.

(Decided March 25, 1919.)

Appeal from Carlisle Circuit Court.

1. **Quieting Title—Actual Possession.**—An action to quiet title does not lie against a defendant who is in the actual possession of the land.
2. **Judgment—Actions at Law—Suits in Equity.**—"A judgment given against a plaintiff on the single ground that he has mistaken his remedy or form of action is no bar to his subsequent action brought in proper form."

JOHN K. HENDRICK and SHELBOURNE & SHELBOURNE for appellant.

JOHN E. KANE for appellee.

RESPONSE TO PETITION FOR REHEARING BY JUDGE SAMPSON.

(For original opinion see 182 Ky. 592.)

The judgment of the circuit court dismissed the petition of the plaintiff Taylor, appellant here, for the reason that she was not in the actual possession of the land at the time of the commencement of the action, following the rule of this court, often announced, that an action to quiet title does not lie against a defendant who is in the actual possession of land, claiming it as his own. As the evidence conclusively proved that appellee Wilson was in the actual possession of the land in controversy at the time the suit was instituted, and the appellant virtually admitted that she was not in the actual posses-

sion, the judgment was affirmed by this court. The proper remedy in such cases is by ejectment.

While Mrs. Taylor was not entitled to maintain an action to quiet title, she could have maintained an action in ejectment. The judgment below did not go to the merits, but only dismissed plaintiff's petition. Such a judgment, though affirmed by this court, does not prejudice the right of Mrs. Taylor to institute and maintain the proper kind of action. "A judgment given against a plaintiff on the single ground that he has mistaken his remedy or form of action, is no bar to his subsequent action brought in the proper form." 2nd Black on Judgments, 715; 1st Freeman on Judgments, secs. 260, 265; City of Covington v. Chesapeake & Ohio Ry. Co., 112 S. W. 862; Rice v. West, 42 S. W. 116, 19 Ky. L. R. 832.

If appellant, Mrs. Taylor, would otherwise have a right of action in ejectment to recover the land in controversy that cause is not prejudicially affected by the judgment in the preceding case to quiet title for the reasons above stated, and that judgment can not be pleaded as *res judicata*.

Kentucky River Timber & Coal Company v. Mosely.

(Decided March 28, 1919.)

Appeal from Leslie Circuit Court.

1. Logs and Logging—Floating Tide—Expert Testimony.—In an action on a logging contract, the opinions of experienced log men who had a special knowledge of the subject and were present and observed the streams on the occasion in question and stated the facts on which their conclusions were based, that a particular tide was not a "floating tide" were admissible in evidence, the subject not being one of such common knowledge that the jury upon hearing the facts could have formed a reasonable opinion for themselves.
2. Logs and Logging—Floating Tide—Evidence—Estoppel.—Where under a logging contract plaintiff was given one more "floating tide" to float logs, the determination of the question was not left to the plaintiff, but the question whether a particular tide was a "floating tide" was one of fact, and plaintiff, who after making a diligent effort to float the logs on a particular tide found that the tide was not sufficient, was not precluded by his conduct,

which in no wise prejudiced the rights of the defendant, from asserting that the tide was not sufficient.

CLEON K. CALVERT for appellant.

LEWIS & LEWIS, JAMES H. JEFFRIES and B. B. GOLDEN for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Plaintiff, E. L. Mosely, brought this suit against the Kentucky River Timber & Coal Company to recover the sum of \$950.00, alleged to be due for services rendered in floating and delivering to defendant certain saw logs. From a verdict and judgment in his favor for \$919.40 the defendant appeals.

In the month of August, 1916, defendant had 12,132 logs in Beech Fork and in that part of Middle Fork of the Kentucky river, lying between the mouth of Beech Fork and the mouth of Greasy Fork. These logs plaintiff agreed to deliver to defendant at the mouth of Greasy Fork. By the terms of the contract, he was to receive 12c. for each log delivered, but was to pay defendant as liquidated damages 50c. for each log not delivered by the first day of July, 1917. Under this contract, plaintiff delivered 6,761 logs and there remained undelivered on July, 1917, 5,371 logs. Because of the non-delivery of the latter logs, plaintiff became indebted to the defendant in the sum of \$2,685.50. Thereupon plaintiff and defendant adjusted their differences by executing another contract, by the terms of which plaintiff was to have one "floating tide" by which to deliver the undelivered logs. If he delivered a sufficient number of the undelivered logs when added to those already delivered to exceed, at 12c. per log, the amount of his indebtedness, then defendant was to pay him such excess. On the other hand, if the number so delivered when added to those already delivered did not exceed his indebtedness, then defendant was to cancel the indebtedness. On December 27, 1916, following, the streams rose and plaintiff succeeded in floating and delivering 2,138 of the logs in question. Another tide occurred on January 4, 1917, when plaintiff floated and delivered practically all of the remainder of the logs.

It is conceded that the liability of the defendant turns on whether the tide of December 27, 1916, was the first

"floating tide" that occurred after the execution of the contract, and this was the only issue submitted to the jury.

According to the evidence for plaintiff, the waters of Beech Fork and Middle Fork, where the logs were situated, rose on the morning of December 27th, but soon subsided. Plaintiff, with the aid of a large number of employes, floated and delivered more than 200 of the logs in question. The tide at that time did not exceed two and one-half feet in height, whereas it was necessary to have a rise of at least four feet.

The logs delivered by plaintiff were only small logs, and he was able to deliver them only after great effort on the part of his men in rolling and pushing them over the rock bars and through the shoals and shallow places of the stream. Plaintiff and several other witnesses, who were present and observed the streams and who were practical log men, gave it as their opinion that the tide in question was not a "floating tide."

It is first contended that the court erred in permitting the witnesses to give their opinions as to the character of the tide, it being argued that their statements that the tide was not a "floating tide," were mere conclusions, and therefore inadmissible. It appears not only that the witnesses were experienced log men, having a special knowledge of the subject, but were present and observed the streams on the day in question, and that some of them actually assisted plaintiff in the work of floating the logs. The facts on which their conclusions were based were within their personal knowledge, and were stated to the jury.

In our opinion, the subject was not one of such common knowledge that the jury, upon hearing the facts, could have formed a reasonable opinion for themselves. Hence, we conclude that it falls within the broad field of opinion evidence, and since the witnesses qualified as experts and stated the facts on which their opinions were based, their opinions were properly received in evidence.

It is further insisted that as plaintiff employed hands and attempted to float the logs on December 27th, and did succeed in floating a large number of them, and thereby construed and treated the tide that day as a "floating tide," he was bound by his conduct and could not thereafter be heard to say that it was not a "floating tide."

This reasoning we are unable to approve. The contract provided that plaintiff should have one more "floating tide," and the parties clearly contemplated that a "floating tide" was one sufficient to enable plaintiff, by the exercise of reasonable diligence, to float the logs to their destination.

The determination of the question was not left to plaintiff. Whether the particular tide was a "floating tide" was a question of fact depending on the condition of the streams and not on plaintiff's judgment or conduct in the matter. Plaintiff's failure to float the logs was not due to any lack of diligent effort, but was due to the insufficiency of the tide. His action in no wise prejudiced the rights of the defendant. When the tide proved insufficient, he was not required to go on with the work, and his mere mistake of judgment in supposing that the tide was sufficient and in making a *bona fide* attempt to float the logs did not preclude him from asserting that the tide was not sufficient.

Judgment affirmed.

Empire Coal Mining Company, et al. v. Empire Coal Company.

(Decided March 28, 1919.)

Appeal from Christian Circuit Court.

1. Vendor and Purchaser—Sale of Mine—Outstanding Lease—Cancellation.—Where a coal mining lease was cancelled for the sole purpose of carrying out a sale of the property covered by the lease, and the sale was abandoned, the cancellation never became effective, and in a suit to recover on the lease against subsequent purchasers of the property who did not know of, or rely upon, the cancellation of the lease, it was not error to hold that the lease had not been cancelled.
2. Mines and Minerals—Sale of Mine—Action on a Lease—Claim of Abandonment—Claim of Worthlessness—Evidence.—In an action by the lessee of a coal mine to recover on the lease against a purchaser of the property covered by the lease, evidence examined and held insufficient to sustain the claim that the lease was abandoned, or that it was of no value.
3. Estoppel—Mines and Minerals—Claim Under Lease—Permitting Improvements and Expenditures.—The lessee of a coal mine is not estopped from asserting its claim under the lease against a purchaser of the property, by permitting the purchaser to make

improvements thereon, where the purchaser had both actual and constructive knowledge of the lease and knew that the lessee was asserting its claim prior to the making of the improvements.

4. **Corporations—Representation of Agents—Scope of Authority—Estoppel.**—It was not within the apparent scope of the authority of the vice-president and general manager of a corporation, owning a lease of coal mining property, who had authority to sell the lease only for cash and who went as the representative of a third party, who had sold the property covered by the lease, for the purpose of delivering the deed and collecting the purchase price consisting of cash notes and stock, to represent to the intending purchasers that the title to the property covered by the lease was perfect, and thereby estop the lessee corporation from asserting its claim under the lease.

CALDWELL & GREER, EDMUNDS & STITES, THOMAS N. GREER and LAFFOON & WADDILL for appellants.

TRIMBLE & BELL and BREATHITT, ALLENSWORTH & BREATHITT for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

The Empire Coal & Coke Company was the owner of 1,200 acres of coal mining lands in Christian county. In March, 1911, it leased the property to the Empire Coal Company for a period of ten years, and the lease was recorded in the county court clerk's office of Christian county. The Empire Coal Company was a corporation organized by Tom and A. V. Rutland, who were brothers and owned all of the stock except one share. Tom was the president, and A. V. the vice-president and general manager. In July, 1915, C. N. Bryan, who resided in Nashville, Tenn., arranged with the officers of the Empire Coal & Coke Company to purchase the property for \$15,000.00, to be paid in cash upon delivery of the deed. Bryan arranged with A. V. Rutland to assist him in making the sale of the property, with the understanding that they were to share in the profits. Bryan traded the property to H. Cohen for a stock of furniture in Nashville. At this time, Bryan had no title. Subsequently, Cohen, for reasons not necessary to state, refused to consummate the trade and the sale was abandoned. Thereupon Bryan endeavored to find another purchaser, and with that end in view, approached a lawyer by the name of G. Bibb Jacobs. Through Jacobs' efforts, J. D. Hutton,

a Tennessee banker, became interested. Jacobs and Hutton then went to Empire to look at the property. They spent the night with A. V. Rutland. After supper, Neal Rutland, a brother of A. V. Rutland, says that he told Hutton and Jacobs that they were operating the mine under a ten year lease. He is corroborated by Mrs. A. V. Rutland. Hutton denies that this statement was made, but admits that he may be mistaken. Jacobs does not deny that the conversation took place. Thereafter, further negotiations took place between Hutton and Jacobs on the one hand, and Bryan on the other, by which Hutton was to purchase a half interest in the property for \$12,500.00 in cash, or its equivalent, and \$25,000.00 of the preferred stock of the First Amortization Mortgage & Bond Company, and Jacobs was to purchase the other half. However, Jacobs had an understanding with Bryan, by which he was not to pay his full half of the purchase price. Of this sum, the Empire Coal & Coke Company was to receive \$15,000.00 in cash and the Empire Coal Company, the lessee, \$12,500.00 in cash. Bryan prepared a deed from himself, conveying the property to Hutton and Jacobs. The consideration expressed in the deed was \$5,000.00 cash and two notes for \$5,000.00 each, due respectively in six and nine months, with a lien on the property to secure their payment, and other valuable considerations. When this deed was prepared, Bryan was unable to go from Nashville to Shelbyville, the home of Hutton, and sent A. V. Rutland there for the purpose of closing the deal. At the same time, Bryan told Rutland to deliver the deed upon the delivery to him of the following money and securities, a list of which was endorsed on an envelope which Rutland carried with him: Cash in a check, \$5,000.00; notes, \$10,000.00; Hutton's preferred stock, \$25,000.00; Jacobs' common stock, \$17,500.00, a total of \$57,500.00. This memorandum was shown to Hutton, and upon delivery of the deed, the items contained in the memorandum were delivered to Rutland. Hutton and Jacobs say that prior to closing the trade, they inquired of Rutland as to the condition of the title, and he replied that there was not a flaw in the title. At the same time, Hutton and Jacobs employed A. V. Rutland as their general manager to run the mines, and agreed to pay him a salary of \$300.00 a month with house rent and fuel free. A. V. Rutland then returned to Nashville and delivered the consideration to Bryan.

Bryan then had no title to the property, but collected the check and discounted the two notes and paid the Empire Coal & Coke Company for the property. Thereupon the Empire Coal & Coke Company executed to Bryan a deed subject to the lease in favor of the Empire Company. The latter deed, together with the deed from Bryan to Hutton and Jacobs, was taken to Christian county and recorded. Hutton and Jacobs then took charge of the mine, and A. V. Rutland proceeded to manage it until the following April, when he resigned. After taking possession, Hutton and Jacobs spent several thousand dollars in buying new equipment for the mine. After the sale, Bryan wanted to pay Tom Rutland in securities, but the latter refused to receive them. Subsequently Bryan sold some of the Amortization stock and paid to the Empire Company \$3,500.00 and assigned to it a lien note for \$1,000.00. Subsequently Hutton and Jacobs organized two corporations, known as the Empire Coal Mining Company and the Empire Coal and Land Company.

This suit was brought by the Empire Coal Company against the Empire Coal Mining Company, the Empire Coal & Land Company, Hutton, Jacobs and Bryan, for the purpose of recovering possession of the coal mines. Subsequently the case was transferred to the equity side of the docket and plaintiff amended his petition and asked the recovery of whatever sum might be found due it under its lease, and that it be awarded a lien on the property to secure its payment. On final hearing, the chancellor gave judgment against Bryan for \$8,000.00. He further held that A. V. Rutland, who owned one-half of the stock of the Empire Coal Company, had so conducted himself that he was estopped from receiving any benefit from the Empire mines, or any judgment against the defendants, but that Tom Rutland, who owned the other half of the stock, was not estopped, and decreed that the Empire Coal Company was entitled to recover, for the use and benefit of Tom Rutland, the sum of \$4,000.00, which was adjudged a lien on the property. From this judgment the defendants appeal.

It is first insisted that the court erred in not holding that the lease, under which the Empire Coal Company claimed, was cancelled and annulled, and that the Empire Coal Company was looking to Bryan for whatever part of the purchase money remained unpaid. With this con-

tention we cannot agree. Fairly considered, the evidence shows that the cancellation of the lease was made for the sole purpose of carrying out the sale to Cohen and was not intended to be effective unless that trade was consummated. In making the purchase, Hutton and Jacobs did not know of or rely upon the cancellation of the lease. Hence, when the sale was abandoned, the condition on which the cancellation was to take effect never occurred. The parties were restored to their former position, and the rights of the Empire Coal Company were in no wise affected.

Nor is there any merit in the contention that the Empire Coal Company had abandoned its rights under the lease, or that the lease was of no value. It had a valid, subsisting lease and was endeavoring at all times to get the sum of \$12,500.00 therefor. Hutton and Jacobs were willing to pay at least \$57,500.00 in cash and securities for the fee to the property. The chief value of the property consisted in the right to mine the coal. That being true, it cannot be said that the lease, which conferred this right, was worthless.

But it is insisted that the Empire Coal Company is estopped from claiming under its lease because it stood by and permitted Hutton and Jacobs to make valuable improvements on the property without asserting its claim. Of course, one who stands by and sees another purchase land or enter upon it under a claim of right, and permits such other to make expenditures or improvements under such circumstances as would call for notice or protest, cannot afterwards assert his own title against such person. 10 R. C. L., sec. 97, p. 782. But a careful consideration of the record convinces us that the facts of this case do not bring it within the foregoing rule. Here Hutton and Jacobs had both actual and constructive knowledge of the lease, and it is equally clear that they knew that the Empire Coal Company was asserting its claim prior to the time the improvements were made.

Another ground of estoppel relied on is the fact that A. V. Rutland, the vice-president and general manager of the Empire Coal Company, represented that the title to the property was perfect. With respect to this contention, our conclusions may be stated as follows: A. V. Rutland went to Shelbyville as the agent or representative of Bryan for the purpose of delivering the

deed and receiving the consideration. It is not clear that Jacobs and Hutton then knew that he was the vice-president and general manager of the Empire Coal Company, or relied upon his authority to make representations on behalf of that company. But, if we go further and assume that they relied upon his statements because they knew that he was the vice-president and general manager of the Empire Coal Company, it remains to determine whether the facts are sufficient to work an estoppel. The leasehold was practically all the property the Empire Coal Company owned. Ordinarily, the vice-president and general manager of a corporation is without authority to sell and dispose of all its assets. Hence such an act is not within the apparent scope of his authority. *Elk Valley Coal Co. v. Thompson*, 150 Ky. 614, 150 S. W. 817. The only actual authority A. V. Rutland had was to sell the lease for cash and this authority did not carry with it authority to sell for anything less than cash. *White Plains Coal Co. v. Teague*, 163 Ky. 110, 173 S. W. 360. Of course, where an agent is acting within the scope of his apparent authority, secret instructions are not binding on the person with whom he deals, but where the transaction, as here, was not within the apparent authority of the agent, Hutton and Jacobs were put on inquiry as to his real authority. 21 R. C. L., sec. 34, p. 855. Had they pursued this inquiry, they would have learned Rutland's actual instructions, and are therefore bound by them. Having authority to transfer the lease only for cash, and Hutton and Jacobs being charged with knowledge of this limitation, it was certainly not within the power of Rutland to accomplish by indirection, what he could not accomplish directly. Under the circumstances, we conclude that it was not within the scope of Rutland's apparent authority, as the vice-president and general manager of the Empire Coal Company, to represent that the title to the property covered by the lease was perfect, and thereby estop that company from asserting its claim under the lease.

Judgment affirmed.

Ballard, et al. v. Smith.

(Decided March 28, 1919.)

Appeal from Bell Circuit Court.

1. **Infants—Action by Parent for Injuries.**—A parent may recover of an employer of his infant child for any damage which the infant might suffer on account of injuries received while the child is engaged in a dangerous or hazardous employment to which the employer assigns it, provided the employer knew that the child was an infant, or could have known it by the exercise of ordinary care and the employment was made without the knowledge or consent of the parent.
2. **Infants—Actions for Injuries—Liability of Employer.**—For the employer to be liable in such cases he must either put the infant at a dangerous or hazardous employment, or consent for him to be so engaged and acquiesce therein, and if the infant is placed at a safe and non-hazardous employment and without the knowledge or consent of the employer voluntarily engages for the time in a hazardous employment without the employer's knowledge or consent, the latter will not be liable to the parent for any injury which the infant might sustain.
3. **Infants—Damages—Measure of.**—The measure of damages in such cases is the value of the infant's services from the time of the injury until he shall arrive at twenty-one years of age, together with the expenses incurred for medicine and medical treatment.

D. B. LOGAN, A. W. BABBAGE and JAMES M. GILBERT for appellants.

J. M. ROBSION and J. D. TUGGLE for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

Appellants and defendants below, J. J. Ballard and A. B. Leibig, owned and operated a laundry in Pineville, Kentucky. On June 22, 1913, they employed Laura Smith, an infant about seventeen years and eight months old, and put her at certain kinds of safe work in the laundry. She continued to work there until July 22, just one month from the time she began, on which day, at the hour of beginning work in the morning, she commenced to feed a machine known as a mangle. Within a few minutes thereafter her hand was caught in the rollers of the mangle and three of her fingers severely mashed and her hand otherwise injured and bruised, the bones in the three fingers being crushed so that according to the testimony

she is probably a permanent cripple. This suit was filed by her father, the appellee and plaintiff, Alex. Smith, against defendants, to recover damages for the loss and deprivation of the services of his infant daughter until she shall arrive at the age of twenty-one years, and "for medical service, medicine and nursing and caring for his said child, because of said injury," which he has expended and which will be necessary to expend in the future, aggregating in all the sum of \$1,000.00, for which amount he asked judgment.

The petition alleged that plaintiff's daughter was under twenty-one years of age, which fact defendants knew, and with that knowledge employed her without plaintiff's knowledge or consent and set her to work at a hazardous employment in operating a mangle, which is a dangerous piece of machinery and requires in its operation special knowledge, skill and experience, which plaintiff's daughter did not possess, and which fact was known by defendants at the time.

The answer denied the averments of the petition and pleaded contributory negligence on the part of the daughter, as well as assumed risk by her, and in another paragraph alleged that she was employed in the laundry to iron shirts with an ordinary smoothing iron, not connected with any machinery dangerous or otherwise, and that she was put at that work and instructed and directed to do no other character of work in the laundry on penalty of being discharged; that at the time she was injured she of her own accord undertook to feed the mangle without the knowledge, direction or consent of defendants or their foreman in charge and was so injured while thus engaged. Counter pleadings formed the issue, and upon trial under instructions from the court the jury returned a verdict in favor of plaintiff for the sum of \$600.00, upon which judgment was rendered, and complaining of it defendants prosecute this appeal.

The chief grounds urged for a reversal are that the court erred in giving to the jury instruction No. 1, and in failing to instruct the jury as requested by defendants. The criticised instruction which the court gave is:

"If you believe from the evidence in this case that the defendants, J. J. Ballard or A. P. Leibig, or any person acting for them, employed Laura Smith, a daughter of the plaintiff, Alex. Smith, to work in the laundry mentioned in the evidence, without the consent of the plain-

tiff, Alex. Smith, and that she was under twenty-one years of age, and that the defendants, or those acting for them, who employed the said Laura Smith, knew or by the exercise of ordinary care could have known that she was under twenty-one years of age, and that she was injured in the hand, and that the work at which she was engaged in said laundry at the time of the injury, if she was injured, was dangerous or hazardous, then you ought to find for the plaintiff, Alex. Smith."

The chief objection to the instruction is that it makes the defendants liable if the work at which the daughter "was engaged" at the time she received her injury was dangerous or hazardous and did not make the liability of the defendants to plaintiff depend upon the dangerous or hazardous character of the work which the daughter was employed to do, or at which she was engaged under the directions, express or implied, of the defendants.

The law seems to be that to enable a parent in cases of this kind to recover of the master for injuries to his infant child, three things must concur: (a) The employer must have known, or by the exercise of ordinary care could have known, of the infancy of the child; (b) the employment must have been made without the knowledge or consent of the parent, and (c) the infant must have been employed to do and put at dangerous and hazardous work, at least to such an extent as that injury would likely result. The general rule upon this subject is thus stated in 29 Cyc., 1643:

"If the child is injured in the course of a dangerous service the employer is liable, but the mere fact that a child was injured while in the employ of a person by whom he has been employed without the knowledge of the parent does not render the employer liable in an action by the parent for the loss of the services of the child, where the employment was not hazardous and the injury was not due to the employer's negligence."

This court seems to have adopted the rule of the text in the cases of *L. & N. R. R. Co. v. Willis*, 83 Ky. 57; *Union News Co. v. Morrow*, 20 Ky. Law Rep., 302; *I. C. R. R. Co. v. Henon*, 24 Ky. Law Rep. 298, and *Hendrickson v. L. & N. R. R. Co.*, 137 Ky. 562.

In the *Willis* case, according to the opinion, the defendant, without the consent or knowledge of the parent, "employed and permitted the son to render service for it in the hazardous capacity of brakeman." It was con-

tended by defendant that it had not employed the son because the conductor, with whose knowledge and consent he was performing the service as brakeman, had no authority to permit him to do so so as to bind the defendant. This contention was rejected by the court and the liability of the defendant upheld upon the ground that "If one engages the servant of another in an obviously dangerous business, he renders himself responsible for any injury which the servant may sustain while so engaged and which can rationally be attributed to the undertaking; and this is so even if the injury results immediately from the neglect or unskillfulness of the servant, owing to the fact that the person, by so illegally interfering, assumes all the risk incident to the service."

In the *Morrow* case the infant was employed to sell papers, magazines and periodicals upon the train while making trips. The instruction, in submitting to the jury the facts upon which defendant's liability depended, said: "If you believe from the evidence . . . that such employment of said Samuel S. Morrow (the infant) was dangerous and hazardous for a boy of his age and experience, and that the said defendant had notice and knowledge, or should have known that such employment was dangerous and hazardous," &c., then the jury should find for the plaintiff. That instruction was approved by this court.

In the *Henon* case the infant was employed by the defendant railroad company to work in a gravel pit, but on the day he was injured he was taken out of the pit and was put to work on a gravel train. While so engaged he was caused through a bump or jar of the train to fall from a ladder and sustain injuries, to recover for which his father brought the suit seeking judgment in his own right as parent. The court referred with approval to the *Willis* case and to the case of *N. N. & M. V. R. R. Co. v. Carroll*, 17 Ky. Law Rep. 374, and then said:

"The circuit court followed the rule laid down in these cases. He instructed the jury that if the son was employed without the knowledge or consent of the father, and was under twenty-one years of age, and this fact was known to the defendant's agents in charge of him prior to his injury, and he was required to perform dangerous or hazardous work, and while thus engaged was thus injured, they should find for the father a fair compensation for the loss of the services of his son during his

minority and for trouble and expense in taking care of him."

In the Hendrickson case the infant was employed in the capacity of brakeman, and in holding defendant liable to the parent in a suit like this, the court *inter alia* said: "The service of brakeman is peculiarly hazardous. The knowledge on the part of the conductor that the son was on the train and rendering service as brakeman was the knowledge of the defendant. The defendant could not with knowledge of the father's rights thus expose the son knowingly to the dangers of such a hazardous business without his consent."

These cases also appear to hold that the dangerous character of the work at which the infant is placed or exposed need not be inherently so. It is sufficient if injury is likely to happen although it could have been prevented by cautious and prudent action on the part of the infant servant. It is not altogether made clear by these and other authorities just why it is essential to the right of the parent to recover that the employment should be dangerous or hazardous, since it would appear that the basis of the action is the deprivation of the parent of the services of his child without his consent. It may be that the rule was founded upon the idea that to otherwise hold would prevent in all cases the employment of infants howsoever safe and free from danger the employment might be. But, whatever the reason for the distinction, it now seems to be too firmly fixed in the law to call it in question. Following the rule as thus laid down, the master in such cases would not be liable to the parent if he employed the child and engaged it to do and put it at work which in itself was safe and in the performance of which it was not injured, and necessarily would the employer not be liable if the child of its own accord quit the safe work which the master assigned it to do and engaged for the time being in a hazardous work contrary to the directions, knowledge or consent of the master.

In this case the evidence is conflicting as to whether Laura Smith, at the time she received her injuries, was working at the mangle with the knowledge or consent of defendants or their foreman in charge. Her testimony and that of some of her witnesses would seem to indicate that it was known to defendants and their foreman that she would upon occasions engage in feeding the mangle,

while it is contended by defendants in their testimony and that of their witnesses that she was expressly forbidden to work at feeding the mangle under all circumstances. With this contradiction in the testimony we think the court should not have based plaintiff's right to recover upon the fact that his daughter was at the time engaged in a dangerous and hazardous work, but that the instruction should have been so qualified as to submit to the jury whether such work was being performed with the knowledge or consent of the defendants or of their foreman in charge,

The instructions which were refused, and of which complaint is made, attempted to submit this phase of the case, but with instruction No. 1 modified as indicated, the entire law governing the rights of the parties will be presented. This may be done by inserting therein, immediately following the words "dangerous or hazardous," these words: "And defendants or their foreman in charge placed her at such work, or knew that she was so engaged and without objection thereto or protesting against it suffered her to remain at it." The instruction will then conform to the law as laid down by the cases, *supra*.

Wherefore, for the error indicated, the judgment is reversed, with directions to grant a new trial, and for proceedings consistent herewith.

Merriweather v. Western Union Telegraph Company.

(Decided March 28, 1919.)

Appeal from Franklin Circuit Court.

Telegraphs and Telephones—Negligence—Limiting Liability by Contract.—Since the passage of the Act of Congress of June 18, 1910 (36 St. Lar. 544) a telegraph company may by contract limit its liability for negligence in failing to deliver an unrepeatable interstate message, and this right is unaffected by the Acts of Congress approved March 4, 1915, and August 9, 1916, known as the first and second Cummins Acts.

IRA JULIAN for appellant.

A. E. RICHARDS, A. B. BENSINGER and ALBERT T. BENEDICT, of New York, for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

The only question upon this appeal is whether or not a telegraph company may by contract limit its liability for negligence in failing to deliver an unrepeatd interstate message. The lower court held such a contract valid and plaintiff has appealed.

Prior to the act of congress, approved June 18, 1910, it was held by this court, in *Chapman v. Western Union Telegraph Co.*, 90 Ky. 265; *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591; *Postal Telegraph Co. v. Schaefer*, 110 Ky. 907 and *Postal Telegraph Co. v. Terrell*, 124 Ky. 822, that such a contract was contrary to public policy and violative of sec. 196 of the Constitution of the state, and therefore invalid, but it was held in *Western Union Telegraph Co. v. Lee*, 174 Ky. 212, upon an exhaustive review of the authorities that by the act of June 18, 1910 (36 St. Lar. 544), the federal congress, in the exercise of its exclusive authority to regulate interstate commerce had authorized such contracts and that neither the local public policy nor constitution could affect the validity of such an interstate contract, nor could either affect, it would seem, independent of the act of 1910, the liability of a common carrier, where the delivery was to be made outside of the state, and the damage alleged is mental suffering only, as is the case here. *Southern Express Co. v. Byers*, 240 U. S. 610, 60 L. Ed. 825.

However, we shall confine ourselves to a consideration of the contention of plaintiff that by the amendments to the Carmack Amendment of March 4, 1915 (38 St. Lar. 1196) and August 9, 1916 (39 St. Lar. 538) known as the first and second Cummins Acts, the rule announced in *Western Union Tel. Co. v. Lee*, *supra*, has been changed and therefore that case is no longer authoritative.

It should be noticed first that the *Lee* case was rested upon the act of June, 1910, and not upon the Carmack Amendment, approved June 29, 1906, which does not seem to have ever been held to apply to telegraph and telephone companies, notwithstanding it was held in *Adams Express Co. v. Croninger*, 226 U. S. 491, to occupy the entire field of legislation and supersede all state rules, laws and regulations pertaining to interstate commerce; on the contrary, it was held by this court, in the *Lee* case, "that congress had not acted upon the subject of interstate messages until the act of June 18, 1910."

To the same effect, and in addition to the authorities cited in the Lee case, see *Cultra, &c. v. Western Union Tel. Co.*, 44 Inter. Com. Com. R. 673.

It would therefore seem improbable that congress, in the Cummins Amendment to the Carmack Amendment, which did not affect telegraph and telephone messages, and referred rather to "any common carrier, railroad or transportation company receiving *property* for transportation," intended to alter the provisions of the act of 1910, which in explicit terms regulated interstate messages, and the ability of such common carriers to contract with reference thereto, even though of course all these acts treat of interstate commerce and are amendatory to the original act of 1887.

Insofar as applicable here, the acts of 1906, 1915 and 1916, *supra*, deal with and refer to the liability of common carriers for losses to property transported, while the act of 1910 refers to and deals with the transmission by common carriers of interstate messages, plainly different classes of interstate carriers and commerce, unless telegraph and telephone messages are property received for transportation.

That the Carmack Amendment, as originally enacted, and as changed by the Cummins Amendment in dealing with carriers' liability relates only to liability for property losses is too apparent for argument, since it expressly applies in both instances to "any common carrier, railroad or transportation company *receiving property for transportation*;" requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "*property for transportation* from a point in one state to a point in another" makes the initial carrier liable "for any loss, damage or injury to *such property* caused by it" or by any common carrier, railroad or transportation company to which such property may be delivered; and affirmatively declares that no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability imposed. And in addition, as finally amended, provides that "any such common carrier, railroad or transportation company so receiving *property for transportation* shall be liable for the full, actual loss, damage or injury to *such property* caused by it or by any such common carrier, &c., to which such property may be

delivered," notwithstanding any limitation of liability or of the right of recovery, however attempted.

It therefore remains only to determine whether or not a message received for transmission is property received for transportation as contemplated by the Carmack and Cummins Amendments. That it is not seems clear not only from the ordinary meaning of the terms, as apparently was recognized in sec. 15 of the act of 1910, where the two classes are separately specified, but as well from the essential differences in the character of the services performed and the rules of law affecting liability in connection therewith, as pointed out in *Primrose v. Western Union Tel. Co.*, 154 U. S. 17, thus:

"The rule of the common law by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies does not extend even to warehousemen or wharfingers or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated and may be ascertained by inquiry of the consignor and the carrier's compensation fixed accordingly and his liability in damages is measured by the value of the goods. But telegraph companies are not bailees in any sense. They are entrusted with nothing but an order or message which is not to be carried in the form or characters in which it is received, but it is to be translated and transmitted through different symbols by means of electricity and is peculiarly liable to mistakes. The message can not be the subject of embezzlement; it is of no intrinsic value; its importance can not be estimated, except by the sender, and often can not be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages for a failure to transmit or deliver it has no relation to any value of the message itself, except as such value may be disclosed by the message or be agreed between the sender and the company."

We therefore conclude that the Cummins Amendments do not apply to telegraph companies or messages,

and do not affect the rule announced in *Western Union Tel. Co. v. Lee*, *supra*, which must be accepted as conclusive upon the question involved here.

Judgment affirmed.

Martin v. City of Lexington.

(Decided March 28, 1919.)

Appeal from Fayette Circuit Court.

Corporations—Wrongful Receipt of Assets—Accounting.—One who owns all of the capital stock of a corporation and who converts to his own use the corporate assets without paying its debts, must respond personally to creditors to the extent of the value of the corporate assets thus wrongfully received by him.

RICHARD C. STOLL and **WILLIAM H. TOWNSEND** for appellant.

JOHN G. DENNY and **J. EMBRY ALLEN** for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Affirming.

On September 1, 1914, Curry, Brown & Snyder, a corporation engaged in the wholesale grocery business, assessed for taxation in the city of Lexington for 1915, personal property of the value of \$60,300.00, and the taxes thereon were due one half June 1, 1915, and the remaining half on December 1, 1915.

By subsection A, section 3187, Ky. Statutes, cities of the second class, to which Lexington belongs, are given the power to enforce the collection of taxes remaining unpaid for thirty days after becoming due "by all remedies given for recovery of debt in any court of this Commonwealth otherwise competent for that purpose," and may consequently, by statutory authority, recover personal judgment against the party owing same when due. On February 8, 1915, all the owners of the capital stock in this corporation sold, transferred and delivered to E. L. Martin their shares of stock, for which he settled with them individually at its par value, as is conclusively established by the evidence, although Martin attempts to construe the transaction to have been the purchase by him of the assets rather than the capital stock of the corporation, admitting, however, that he

assumed and paid all of the corporate debts except this and one other, and that he paid for the business the par value of the capital stock, the certificates for which later came into his possession. After this transaction Martin took charge of the business and commingled with its stock of merchandise his own previously owned merchandise of the same kind.

In June, 1916, the city instituted this action against the corporation, Curry, Brown & Snyder, its stockholders and Martin to recover these taxes long since past due and unpaid, with interest and penalties.

The trial resulted in a personal judgment against Martin for the amount due, with a lien upon so much of the property still owned by Martin and formerly owned by the corporation, as could be identified as the same as that assessed. Martin has appealed only from the personal judgment against him.

Since Martin purchased and became the owner of all of the capital stock of the corporation, and thereafter commingled its assets with other like property of his own and converted same to his own use, leaving nothing to the corporation with which to pay its debts, there can be no doubt of his personal liability for the corporate indebtedness, because of the thoroughly established and correct principle of law that stockholders who divide up and convert to their own use corporate assets without paying its debts must respond personally to creditors to the extent of the value of the corporate assets thus wrongfully received by them; and there is no question but that Martin received all of the assets of the corporation and largely in excess of the amount of this indebtedness. Some of the cases from this court so holding are Gratz v. Redd, 4 B. Mon. 178; Grant Assg., &c. v. Southern Contract Co., &c., 104 Ky. 781. and Martin v. Comth., 181 Ky. 212.

The statute, *supra*, applicable to cities of the second class, and expressly empowering them to enforce payment of taxes by "all remedies," and therefore by ordinary processes for personal judgment, obviates in this case the only question that gave the court any serious trouble in Martin v. Com., *supra*, where such authority for a personal judgment was lacking.

Wherefore the judgment is affirmed.

Bryant v. Hamblin, et al.**Sutton, et al. v. Bryant and Hamblin.**

(Decided March 28, 1919.)

Appeals from Whitley Circuit Court.

1. **Public Lands—Boundaries—Surveys.**—A patent excluding all lands within the boundary theretofore surveyed has application only to valid, subsisting legal entries and surveys, and does not include surveys never perfected as required by law.
2. **Adverse Possession—Boundaries.**—To support a title by adverse holding the possession must be continuous, actual, open, notorious and peaceable for at least fifteen years; the exterior boundary lines of the land claimed must be well defined, that is, either actually enclosed or so marked that the land is susceptible of identification by its description, and the possession must have been of such a character and extent as to preclude the idea that the right of possession was in any one else.
3. **Adverse Possession—Boundaries.**—To extend his possession beyond his close, an adverse claimant, as against seniors in title, must claim and hold the remainder of the land either under color of title or to a well marked boundary for a period of fifteen years.
4. **Public Lands—Failure to Register Survey.**—One entering under a county court land warrant, executing a bond, for cited consideration, not paying for the land and failing to register his survey in the land office within the time specified by statute, legalizing the proceedings, forfeits all rights under the warrant or survey.
5. **Adverse Possession—Actual Possession.**—There must be an actual possession of some part of the land claimed adversely with the intention to hold and possess it all; mere accidental or unintentional holding or possession is not sufficient.
6. **Appeal and Error—Records—Presumptions.**—This court will conclusively presume, after submission, that a record brought here on schedule filed in the lower court, as prescribed by the Code of Practice, is a complete record.

H. G. GILLIS for Sutton heirs and Richard F. Hickman.

STEPHENS & STEELY for Roberta S. Bryant.

J. B. SNYDER and B. B. SNYDER for Sumner heirs.

ROSE & POPE for Pleas Hamblin.

OPINION OF THE COURT BY JUDGE QUIN—Affirming in part and reversing in part.

The appellant, Roberta S. Bryant, plaintiff below, is the owner of approximately 1,000 acres of land under

what is familiarly known as the "Hudson and Wait Patent," No. 24,081, dated October 18, 1855, under a survey of September 4, 1854. All land previously appropriated within the exterior boundary of said patent is expressly excluded therefrom. Plaintiff is asserting title to only so much of the land as was vacant and unappropriated on the day of the survey, the acts complained of in her petition having been committed on the tract not embraced within the exclusion. She alleged that the defendants, Pleas Hamblin and others, had entered upon her lands, on the waters of Buzzard, Crow and Cantrill creeks, and had begun cutting the timber and committing other trespasses thereon; and she asked that they be enjoined and restrained from committing other trespasses upon her property.

By an amended petition Richard F. Hickman, the heirs of J. F. Sutton, the heirs of Nehemiah Sumner and others were made defendants, it being alleged they were claiming an interest in the land described in the petition, and were threatening to commit trespasses upon said land. An injunction was asked against each of them.

From a judgment in ten paragraphs, entered by the court below, the plaintiff, Roberta S. Bryant, has prosecuted an appeal against Pleas Hamblin, Richard F. Hickman, the Sutton heirs, and the Sumner heirs, while Richard F. Hickman and the Sutton heirs are prosecuting an appeal against Roberta S. Bryant and Pleas Hamblin.

The several defendants not only claim all, or a major portion, of the land described in the petition, but claim the land as against one another, and to certain portions of the land involved in this lawsuit there are three or more claimants. Some of the defendants filed no pleadings, and no proof was taken in their behalf; others filed pleadings, took proof and from the judgment, in so far as it denied their claim, they have appealed.

The present appeal, therefore, resolves itself into a contest as to ownership of the land involved, as between Roberta S. Bryant, Pleas Hamblin, Richard F. Hickman, the Sutton heirs and the Sumner heirs, the case having been briefed on behalf of each and all of the above named.

Pleas Hamblin is the son of Jackson Hamblin, and represents the heirs of his father. Title is claimed by the various parties under surveys and by adverse possession. We will discuss the case under several sub-

heads, taking up in order the claims of each of the parties to the appeal.

Sumner heirs. In paragraph six of the judgment it is adjudged that the heirs of Nehemiah Sumner are entitled to the three tracts set out in their answer not covered by the claims of David Privitt or the possession and title of Pleas Hamblin. The court then specifically describes the property so adjudged to the Sumner heirs, together with the several tracts excluded therefrom.

It is agreed between the parties that appellant, Roberta S. Bryant, is the owner by title of record to the Hudson & Wait 10,000 acres patent No. 24,081. The tracts adjudged the Sumner heirs are included within the exterior boundaries of the Hudson-Wait patent.

The land claimed by the Sumner heirs is alleged to be embraced within the exclusion of the foregoing patent. By an act of the legislature of 1835 (Session Acts, p. 359) control of all vacant lands was vested in the several county courts, by the later act of 1837 (Session Acts, p. 250) provision was made for the appointment of a county treasurer to whom application for the purchase of this land should be made, warrant for the land purchased to be issued by the county clerk upon presentation to him of a receipt given by the treasurer.

March 9, 1846, the following order was entered in the Whitley county court: "Received a bond of Middleton Meadors for twenty dollars (\$20) for 800 acres of vacant land in Whitley and the clerk of the Whitley county court is authorized to issue a warrant for the same this 9th day of March, 1846.

"(Signed) JAMES K. GALLION, C. T."

"The Commonwealth of Ky. to the surveyor of Whitley county, greetings. You are hereby authorized and directed by yourself or deputy to survey in one or more surveys for Middleton Meadors 800 acres of vacant and unappropriated land in your county, he having produced to me the county treasurer's receipt for a bond for twenty dollars (\$20), the price thereof, as required by law, and this shall be your warrant for the same."

Copies of the two surveys referred to in the judgment are found in the record, the one being for Nehemiah Sumner as assignee, the other for Sumner, Lamb and Easthouse as assignee under warrant 272 to Middleton Meadors.

Construing the acts of 1835 and 1837 as authority for such, the Whitley county court sold much of the vacant land for notes and bonds. This manner of disposing of these lands led to the passage of the act of March 5, 1850 (Session Acts 1849-50, p. 399), legalizing the receipt of bonds in the sale of vacant land in Whitley county, said bonds or their proceeds to be appropriated for road purposes the same as if the money had been paid therefor. Said act made it unlawful thereafter for the Register of the Land Office to receive or register any plat or certificate of a survey made by the surveyor of Whitley county, upon county warrants, without a certificate from the county treasurer accompanying it, showing the land had been paid for in money or labor according to the order of said court.

By an act approved March 18, 1851 (Session Acts 1850-51, p. 305) the citizens of Whitley county were given until March 1, 1852, to return plats and certificates of said surveys to the Register of the Land Office, as provided in the act of 1850.

In *Bryant v. Kentucky Lumber Co.*, 144 Ky. 755, in speaking of these several acts, especially the last one, the court said: "The plain purpose of this act was to require all these matters to be closed up by March 1, 1852; that is, the parties who had made these surveys were given a year to pay the price and take out their grants. The necessary meaning of the statute is that they were required to pay the price and register their surveys within the time specified and that they could not do so thereafter. The Gillis survey was made on February 28, 1851, or eight days before the passage of this act. Gillis had under the act until March 1, 1852, to return the plat and certificate of survey to the Register of the Land Office with a certificate of the treasurer of the county that the warrants had been paid for. When he did not do this, he lost all his rights under the warrant or survey. If it should be held that the statute is not mandatory, and that these surveys could be carried into grant by a compliance with the statute after the time fixed in it, then it would be meaningless, and the purpose of its enactment would be defeated. The rule is that under statutes conferring privileges on private individuals for a certain period of time, the privilege can not be exercised after the time allowed. (36 Cyc. 1160; Black on In-

terpretation of Laws, 359, 26 Am. & Eng. Ency. of Law, 691, and cases cited.)

"It is insisted that the receipt of the treasurer is for a bond for \$1,000.00, and that we can not say now what sort of a bond this was; but when the receipt is read in the light of the legislative acts above referred to, there is no question what it means. It refers to one of the bonds which the Whitley county court, by its orders, allowed taken. The county treasurer was not authorized by the act of 1837 to take anything but money, and he does not receipt for money. He did not take the bond as money; he receipted for what he got, a bond. His receipt does not show that anything was paid and there is nothing in the record to indicate that anything has ever been paid on this land from that time to this."

To the same effect is *Ford v. Bryant*, 158 Ky. 97, wherein, after quoting from the opinion in the above case, the court says: "In view of the above authorities, we conclude that the expression 'plotting out of this survey all lands heretofore surveyed,' contained in the Hudson and Wait survey, applies only to valid surveys, and does not include surveys which were never perfected in the manner required by the statute."

The Bryant mentioned in the above two cases is the present appellant, and those appeals involved the same patent herein referred to.

By the order of the county court of March 9, 1846, it will be seen that the warrant was ordered issued on the execution of a bond for \$20, "the price thereof as required by law." There is nothing in the record showing a compliance on the part of the patentee or those claiming under him, with the provision of the acts of 1850 and 1851. March 1, 1852, was the final date fixed in the latter of these two acts for filing the plat or certificate, accompanied by the treasurer's receipt.

Passing on this question we said in *Stephens v. Terry* 178 Ky. 129, 141: "A copy of the bond executed by Cox, Williams and McLancy is not on file, but it can only be concluded, that it was one executed in accordance with the order of the county court and described in the acts of the legislature with reference to them, above quoted. The provisions of the act of March 8th, 1851, do not mention entries or the disposition of warrants, which had been issued upon the execution of bonds, and where no entries were ever made, but, as it renders invalid a sur-

vey, made by virtue of such a warrant, which had not been filed with the register and the land paid for before the first day of March, 1852, it would seem that an entry made under such a warrant and not carried into grant before the first of March, 1852, and the land paid for, would, also, be invalid, as well as such a warrant, which was not entered, survey made and returned to the register before that date. The purpose of the act was to make an end of the practice of issuing warrants, where the land authorized to be appropriated was not paid for. Furthermore, it is apparent, that the holder of such a warrant could not make an entry by virtue of it, or a survey under it, after the first day of March, 1852. . . . Cox, Williams and McLancy had until March 1st, 1852, to survey the entry made under the warrant, No. 464, pay for the lands and file their survey with the register, but they did nothing of the kind. Doubtless they recognized that their warrant and entry were both invalid after March 1st, 1852, as they took no other steps in regard to them."

It is true, as urged by counsel for the Sumner heirs, that a party must recover upon the strength of his own title. Nor is it sufficient, as against one claiming under a valid grant, that the property in contest is embraced within the exterior boundary of the patent; it must be shown that it is not within the exclusion.

But, to use the language of the court in *Bryant v. Meaders*, 183 Ky. 651; the exclusions apply to "only subsisting legal entries and surveys that are excluded by such reference in a patent and for which the statute invalidates subsequent entries, surveys or patents." In this suit the court referred to the cases in which the Hudson and Wait patent has been upheld as a valid patent by this court. The question there involved was whether a survey made December 21, 1853, upon which a patent for 200 acres was issued to Jacob E. Harmon, through whom the appellees claimed, was a valid survey. The order of the Whitley county court in that suit was issued in consideration of a bond as in the instant suit, and not for a cash consideration, as required by the acts of 1835 and 1837; after referring to the acts of 1850 and 1851, the court quotes, with approval, from *Bryant v. Kentucky Lumber Co.* and *Stephens v. Terry*, *supra*.

We do not think the claim of the Sumner heirs is based upon a valid subsisting legal entry, patent, or sur-

vey as of the date of the Hudson and Wait survey and patent, and hence, as to them, the court erred in so far as it adjudged them to be owners of any of the land in contest.

Richard F. Hickman. The claim of Hickman was dismissed by the lower court because he did not show title in himself to any part of the land claimed by him. He was granted and has taken an appeal from that judgment, making Roberta S. Bryant and Pleas Hamblin appellees, inasmuch as the land claimed by him was awarded to them.

The schedule in this case directs the clerk to copy the entire record so far as it affects Richard F. Hickman, and others named, including all of the pleadings and orders with reference thereto. After a careful examination of the entire record, we have been unable to find any pleading filed or tendered by Hickman. We find depositions of said Hickman and other witnesses in his behalf, and since the appeal is briefed on his alleged claim we will treat the case as at issue as to Hickman.

Counsel, with commendable forethought and to save expense and facilitate the preparation and trial of this complicated suit, by an agreed order entered March 6, 1915, controverted of record all the affirmative matter in all pleadings.

Hickman was made a defendant in an amended petition, in which it was alleged that Hickman and other defendants were claiming an interest in the land described in the petition. Traversing this allegation would not aid his cause.

From the brief we find Hickman is claiming title by purchase from Mark Creekmore to 100 acres above Crow creek, being one-half of a 200 acre survey made by Nicholas White in 1844, and also claims title by adverse possession. Hickman claims to have made a crop on the land in 1877, and later to have leased the land to Jackson Hamblin, father of Pleas Hamblin, 23 to 30 years ago. The senior Hamblin was dead at the time this deposition was taken, and all parts of the deposition relating to conversations with decedent were excepted to. He introduced three other witnesses to prove the lease. The reputation of one of these for truth and veracity is said to be bad; another, on cross-examination, testifies that he had in mind an entirely different tract of

land. The third witness testifies to a conversation with the elder Hamblin as to the erection of a fence on what is claimed as the Hickman land, and he does not remember when this conversation took place. Hickman says it was supposed to be all the land between Cantrill creek and Crow creek, and when asked to give the boundary set out in the original survey, he thus describes it: "Beginning at the mouth of Cantrill creek, I believe, is the best of my knowledge, marked on water birches and a pine, I believe, running down with the meanders of the river 190 poles to a black oak or water oak at the first branch below Crow creek; running up the hill northeast to a post oak on a ridge to a side of a path; thence north several degrees, don't remember exactly, to a black oak on a ridge, thence north again more degrees than the first; I don't remember how many degrees, so many degrees east, was more degrees east than any other, I remember, to a black oak on the top of a ridge, then the line turned again north; I don't remember exactly what the next corner was or how far it was. . . .

"There was two or three other corners running up there and made a smoothing iron shape and the next corner where it made the next turn on a poplar near the Hollow Rock, 325 poles. Crossing Crow creek to the George Sumner land, known as the Jim Sumner survey. It went on to the Sugar creek fork on Crow creek, as well as I remember, to a bunch of sugar trees, and it was marked on the sugar trees. It went from there across the divide between Crow creek or the sugar tree fork and Cantrill creek. That is my understanding; it ran to Cantrill and then down to Cantrill creek to the beginning."

No written evidence is produced showing his ownership of the land, no deed, patent, entry, survey or tax receipt, either by original or copy. True he testifies he had a copy of a survey and the last time he saw it was eight or nine years before giving his deposition, when it was in the hands of two persons in Williamsburg. He does not introduce either of these, but states that both of them "say they have not got them." He further states that the survey was recorded in the surveyor's book—he saw it there in 1876—that later one of his attorneys told him that after this survey was copied into a new book the leaf containing the plat had been torn or cut out of the book. He has never personally examined the book to verify this alleged fact, nor does he introduce

the surveyor or any other person to prove same, and yet, on this vague, doubtful, unfixed and hazy description and evidence we are asked to adjudge title in him. This we cannot do. The chancellor did not err in dismissing his claim.

Sutton Heirs. The Sutton heirs claim the one-half, or 100 acre survey of Nicholas White, below Crow creek; they also claim under a Jack Harmon survey of about 1842, and also by adverse possession. J. F. Sutton, who was made a defendant in the original petition, filed an answer controverting the allegations thereof. The death of said Sutton is noted in the amended petition, and his widow, Emily Sutton, and two children, Stella Gillis and Henry Sutton, as his only heirs-at-law, are made defendants. They have appealed from the judgment dismissing their claim, making Roberta S. Bryant and Pleas Hamblin appellees.

Much we have said about the Hickman claim applies to this, at least that part where their rights are based on the Nicholas White survey.

We will discuss their claims first under the surveys and then by adverse possession.

I. The surveys. The Nicholas White survey was never carried into patent. Neither the White nor the Harmon surveys are of record; counsel says the originals are lost and could not be produced.

There is no pleading by the Sutton heirs setting up any claim to any portion of the land described in the petition, nor in the answer of Pleas Hamblin—no boundary is claimed by them. Thus we meet with practically the same indefiniteness and uncertainty as confronted us relative to the claim of Hickman, and the proof as to the Sutton title is almost as vague. Counsel concedes that the evidence as to the Harmon survey is meager, also that there is little evidence as to when that survey was made.

II. Adverse possession. We have read and reread the depositions taken on behalf of these parties, and without entering into a detailed discussion of same, we deem it sufficient to say we cannot find testimony that would warrant us in reversing the judgment as to them. For example, James White, in speaking of the deal between Harmon and Sutton, says: "Well, it was land there about Crow creek, below this Nicholas White land, is the way I understand it"—he did not know how many acres, nor the date of the survey, and never saw any survey.

G. W. Early found one corner tree about 40 poles from the river. Says that Joe Sutton did not live on the surveys. Witness purchased a one-half interest of Harmon tract from Sutton. He claimed to have a copy of the Nicholas White survey, which was lost, and when asked if it covered any of the land he now claimed an interest in, he responded: ". . . Nothing, only we started from where they told us had been a corner and started up on that line and run that far and it came night and we quit and never got back any more."

Mark Creekmore never saw but two of the corners. It will be remembered that no pleading was filed by Hickman and only a traverse by the Sutton heirs, hence neither by pleading has set up any definite boundary claimed by them.

It is in evidence that about the year 1880 Sutton built a fence enclosing the lands to which he claims title. Logs, brush and rails entered into its make-up and cliffs were used wherever possible, one of the witnesses saying: "We cliff-fence down there a whole lot." S. R. Sutton says the fence was kept up for about four years, when it burned, that is, most of the rails were destroyed. It is doubtful if any part of the claimed boundary could be located, other than by occasional reference to the "Long Bottom," "Sheep Park," "Bend in the river," "Buz-zard," "Crow creek," etc.

The lines are not marked by courses or distances; a few marked trees are referred to, but practically no lines any one could follow.

To support a title by adverse holding three facts must be established: (a) the possession must have been continuous, actual, open, notorious and peaceable for at least fifteen years; (b) the exterior boundary lines of the land claimed must be well defined, that is, either actually enclosed or so marked that the land is susceptible of identification by its description, and (c) the possession must have been of such a character and extent as to exclude the idea that the right of possession was in any one else.

The rambling, uncertain and indefinite character of the evidence, coupled with the silence of the pleading as to the boundary claimed by the Sutton heirs, can lead to but one conclusion, viz., the lower court did not err in dismissing their claims.

Jackson Hamblin's heirs. In paragraph seven of the judgment it is adjudged that Pleas Hamblin is the owner (1) of the surface of the land contained in the boundary described therein, being between Cantrill Branch and Crow Branch; (2) another tract on Cantrill Branch; (3) a tract on Cumberland river and (4) a tract on the south bank of the river.

By an agreement between Roberta S. Bryant and Pleas Hamblin, the controversy as to them is reduced to the Sanford T. Barnett patent for 200 acres surveyed June 4, 1883. Barnett's being the junior patent, the claim, if any, of the Hamlin heirs must be based upon adverse possession.

Reverting to the evidence we find—Pleas Hamblin, in his deposition, taken March 20, 1915, testifies (in narrative form), that he has claimed this land, "18 or 19 years, according to his recollection." It has been enclosed for 18 years or somewhere near about that. He and his father paid the taxes. In another place he says the fence referred to in the record as the "sheep park fence," was put up 17, 18 or 19 years ago. Two-thirds of the fence consists of cliffs; the wire fence is just across the gaps. At the time the fence was erected he never heard his father say he claimed to own all the land inside the fence. He fenced it for herding purposes, following the cliffs because it made less work to fence it. Only knows of three marked lines in the Barnett survey. When asked if either he or his father ever had any clearings or made any improvements upon the Barnett patent since they had the fence around it, he says: "Right along up in here some clearings run outside a little bit." About two acres in all or probably a little more than that. He states it had been cleared for about seventeen years.

L. E. Bryant is a son of plaintiff and his deposition was taken on interrogatories propounded by the Hamblin heirs, and he thus testifies as to the fence: "Jack Hamblin was a long standing acquaintance of mine. I saw him at most every court four times a year at Williamsburg. Early in our acquaintance he proposed to me to permit him to enclose about 1,000 to 1,500 acres of our wild land with a wire fence for a sheep ranch, and keep them out fire and protect the timber and hold possession of the land for as at that time we had many adverse claims to our land and this seemed a practical plan from a friend and after consulting the family I consented. Mr.

Hamblin and I talked the matter over from time to time when he would report to me of the claims of others and the condition of our possession. He never held adversely to us."

Sanford T. Barnett and wife deeded, without warranty, their undivided interest in this land to the senior Hamblin, March 24, 1898, for a consideration of twenty dollars.

Summing up the testimony on this branch of the case it appears that about 23 years ago the senior Hamblin, while fencing the Hawkins McKee survey, so extended or erected the fence as to include about two and one-half acres of the tract in controversy.

About 17 years before his deposition was taken he testifies this small tract was cleared up, and at the time it was fenced Pleas never heard his father say he claimed it as his own land.

At most it would seem the enclosure and clearing of this $2\frac{1}{2}$ acres was accidental and unintentional, and without claim of right or possession on the part of Jackson Hamblin at the time. The petition in the present suit was filed January 30, 1912, hence at this date the period of occupation was less than fourteen years. The clearing was coincident with the execution of the deed from Barnett and his wife, which bears date of March 24, 1898. Pleas Hamblin, in his deposition taken March 20, 1915, says the clearing was made 17 years before, which would make it March, 1898.

Possession to defeat title must be actual, as well as adverse and continuous, and to a well defined and marked boundary for as much as fifteen years before the institution of an action by the holder of the legal title. *Gatliff v. Carson-Muse Lumber Co.*, 159 Ky. 833; *White v. McNab*, 140 Ky. 820.

We think the court was in error in adjudging that Pleas Hamblin was the owner of the tract described in paragraph seven of the judgment.

The schedule and record. A motion of Pleas Hamblin to strike from the transcript all parts not embraced in the schedule was passed to the submission on the merits. The schedule in this case directs the clerk to copy the entire record in so far as it affects the parties to the appeal, and contains this sentence: "All of the pleadings and orders with reference thereto are directed to be copied, to-wit:" and here follows an enumeration of 44 different items. The appellees' contention is that the

record contains more than called for in the schedule, and that the record actually contains 83 different pleadings, depositions, etc. It is true that the record does contain a great many more separate orders or pleadings than are referred to in the schedule, but this apparent discrepancy is explained, in the main, by the fact that the schedule in one item called for the depositions of certain parties, whereas in the transcript there appear a number of depositions filed in behalf of said party. As an illustration, an item in the schedule calls for the depositions of the Sutton heirs; as a matter of fact there are six depositions for them in the record. This, we think, explains the apparent difference complained of by counsel. Another place the schedule calls for an order filing an amended petition; this appears in the transcript under two headings, first the order itself and second the amended petition, and we do not suppose that counsel would contend that in this instance the schedule did not call for the amended petition. Counsel do not claim or contend that any parts of the record have been omitted, but their objection is there is too much record here. Furthermore, that a discretion was given the clerk as to what parts of the record should be copied, the schedule having directed the clerk to copy the entire record so far as it affected any of the parties to the appeal. Unless there is an omission of some portion of the record affecting some of the parties the motion to strike should be overruled, because it does not appear upon an examination of the record there were any portions copied not pertinent to the appeal on behalf of any of the several parties. Sec. 737 of the Civ. Code provides, in part, as follows: "The appellant, within ninety days after the granting of the appeal, shall file in the office of the clerk of the inferior court a schedule, showing, concisely, what parts of the record he wishes to have copied. His failure to file said schedule within the time prescribed shall be cause for the dismissal of his appeal."

A notice of the filing of this schedule was served on Pleas Hamblin. The notice states that the schedule directs the copying of the entire record so far as it affected Pleas Hamblin and others to the appeal. We think this was ample notice to him as to what parts of the record would be included in the transcript. Provision is made in the section of the Code, *supra*, by which the appellees may file a schedule similar to the one the appellant

is permitted to do. The clerk certifies that the record filed in this court "is a true and correct copy of so much of the record as is directed by the schedule."

Appellee complains the schedule does not direct the copying of the appellant's petition. The first order called for in the schedule is thus given, "O. B. 38, page 30," which we assume was the petition, although not specifically mentioned, but we do not see how the directions to copy the entire record could be obeyed, or the record certified as complete without the petition.

Rule 14 of this court is as follows: "The court will conclusively presume, after submission, that a record brought up to this court on schedule filed in the clerk's office of the inferior court, as prescribed by section 737 of the Code of Practice, is the complete record, and that all parties interested have consented to try the appeal on such record. Before submission the court will, in its discretion, allow a transcript of other parts of the record to be filed when deemed necessary in furtherance of justice." See also *Clevinger v. Nunnery*, 140 Ky. 592, wherein the court says: "Under the rule, where a schedule has been filed as prescribed by section 737 of the Code, it will be presumed that all that is material in the record is contained in the transcript, and that the parties have consented to try the appeal on the transcript; but the rule has no application unless the schedule has been filed in the clerk's office as prescribed by section 737 of the Code."

We think under the provision of the Code, the rule and authority above cited that appellee's motion to strike from the transcript should be overruled.

Wherefore, upon a consideration of the whole case and for reasons hereinabove given, the judgment appealed from, in so far as it affects the Sutton heirs and Richard F. Hickman, is affirmed; as to the Sumner heirs, the judgment is reversed, and as to the Hamblin heirs and Pleas Hamblin so much of paragraph seven as adjudges that Pleas Hamblin is the owner of the tract of land described as: "Beginning at a maple and black oak; thence, N. 40 E. 38 poles to two chestnut oaks; thence N. 10 E. 32 poles to a post oak on a ridge; thence N. 62 E. 40 poles to a chestnut and black oak; thence N. 4 E. 18 poles to a black gum; thence N. 60 W. 20 poles to a black oak; thence N. 45 W. 36 poles to a poplar and white oak; thence N. 49 W. 10 poles to a black oak;

thence N. 100 poles to a stake at the Hollow Rock; thence west 320 poles to the Cumberland river; thence up the river with the meanders thereof to the beginning," be, and the same is, hereby reversed, and this case is remanded to the lower court for such further proceedings as may be necessary and consistent with this opinion.

**Stewart, Administrator William Blanks, Deceased v.
Wisconsin Steel Company.**

(Decided March 28, 1919.)

Appeal from Harlan Circuit Court.

1. Master and Servant—Benefits under Relief Department.—It is a condition precedent to the right to recover benefits under a relief department of the employer that the employe or his estate comply with the requirements and terms specified by said department.
2. Master and Servant—Benefits Under Relief Department.—One violating the rules and regulations of a relief department is not entitled to recover any benefits thereunder, it being expressly provided that breach of the rules will bar the right to such benefits.
3. Master and Servant—Benefits Under Relief Department.—An employer proposing to give benefits to an employe has the right to fix the terms and conditions under which the employe may be entitled to receive such benefits.

ZEB A. STEWART for appellant.

SAMPSON & SAMPSON for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

William Blanks, a boy about 17 years of age, was employed December 1, 1915, by appellee to work in its mines at Benham, Kentucky; on the 6th of December, after he had quit work for the evening and had started towards the outside of the mine, he was killed by an explosion; he was found, in an unconscious condition, with his body across the track; he was placed upon a stretcher but expired in a few minutes, and before reaching the outside of the mine.

The appellee company maintained what is called an "Industrial Accident Department," which appears to be

a plan or system adopted to provide compensation for its injured employes. This was before the passage of the Workmen's Compensation Act, approved March 23, 1916.

In the present suit the appellant, as administrator of the estate of William Blanks, is not seeking damages on account of the negligence of the appellee, but is seeking to recover the amount claimed to be due decedent's estate under the terms and conditions of the Industrial Accident Department, which for brevity will be hereafter referred to as the I. A. D.

After sustaining a demurrer to the petition as amended, a second amendment was filed and on the issues thus joined a trial was had and at the conclusion of appellant's evidence there was a directed verdict for the company, from which judgment an appeal has been prosecuted. Appellant contends his decedent was entitled to the benefits of the I. A. D. as a part of his contract of employment, the contention of appellee being that under the plan of the I. A. D. no premiums or other payments were made by the employes, and it was optional with them whether they would take the benefits of the plan or elect to prosecute their claims for damages and no benefits accrued to any employe until after disability, nor, in the event of death, to their estate until the disabled employe or his executor or administrator filed a written election to accept the benefits of the I. A. D., and waive any and all right or claim to damages. To the better understanding of the questions involved we will advert to such of the provisions of the I. A. D. as appear to be pertinent to this appeal.

Sec. 1 thus defines membership: "Employes of the above named companies, who are employed in the works, twine and lumber mills and mines, are entitled to the benefits of this plan, except those employed in the states where the company pays or may decide to pay compensation for industrial accidents in accordance with the provisions of Workmen's Compensation Laws."

Sec. 2 describes the purpose of the plan as the "prompt, definite and adequate compensation for injuries resulting from accidents occurring to them while engaged in the performance of their duties; and also to provide compensation to the widow, child, children and relatives, who may be dependent upon any employe whose death results from such accident."

Sec. 14, under death benefits, are these provisions: "All death benefits shall be paid to the administrator or executor of the deceased employe, in trust for his widow, children, or other relatives, who were dependent.

"No death benefits shall be paid unless death results within fifty-two weeks from the date of the accident, nor unless a written claim therefor shall be filed by the executor or administrator of the deceased employe with the board of management within three months after the employe's death."

Under section 17, defining disability, are these provisions: "No benefits shall be paid unless the injury or death is caused, directly or solely, by an accident arising out of and in the course of the employment. . . . Benefits shall not be paid for any injury or death resulting from or caused, directly or indirectly, wholly or in part, by the intoxication or partial intoxication of the employe (page 13 of booklet) or by his failure to use the safety appliances provided by the company, or by his gross or willful misconduct."

Sec. 20 is as follows: "The acceptance of any of the benefits herein provided shall operate as an election to take said benefit and such further benefits, if any, as may become due under these rules in full satisfaction and release of all claims against the company and all other companies associated in this department, arising out of the injury or death for which such benefits are paid. No person shall receive any benefit without first giving a written instrument evidencing such election and release. The company upon requiring and receiving any such release, shall become obligated to pay all further benefits, if any, which may become due under these rules on account of the injury or death in question.

"No death benefits shall be due or payable unless such release shall have been duly executed by all persons who might legally assert any claim growing out of the death of the employe. The commencing of any legal action whatsoever against any of the companies associated in this department on account of such injury, by the employe, or in the event of his death, by his executor, administrator or personal representative, shall be a bar to the recovery of any and all benefits herein provided; but in such event the employe shall be entitled to have

refunded to him any contributions paid since the receipt by him of disability benefits, and no more.

"The benefits of this plan are offered upon the express condition that all the rules and regulations herein contained shall be faithfully and strictly obeyed by the employes, and a complete compliance with each and all such rules and regulations shall be and is a condition precedent to the right to receive any benefits whatsoever."

There is also in evidence a copy of the rules for the government and operation of the company's mines, approved by the Chief Inspector of Mines, sec. 35 of said rules being as follows: "The practice of carrying explosives and caps in the same package, or of storing them together is absolutely prohibited. Explosives and tools must not be placed in or upon any empty or loaded cars."

To be entitled to the benefits of the I. A. D. employes must comply with the terms and conditions thereof, as well as the rules and regulations in regard to the operation of the mine, as set forth in Rule No. 35.

Decedent left no widow or children; his mother was living in Mississippi, where she and her husband owned a farm of about 80 acres, she having married her second husband after the death of decedent's father about fifteen years ago. The company telegraphed his mother on the 7th notifying her of her son's death, and asking what disposition to make of the body, and on the 8th they telegraphed and wrote her that it would be impossible to send her the body because the express company required embalming and shipment in an hermetically sealed casket, but these requirements could not be met because there was no undertaker at Benham. In response to a letter from decedent's mother the company, on February 15, 1916, explained to her how her son was killed, stating that the company was not responsible for the accident. It appears from this letter that the son had a stick of coalite powder and some dynamite caps in his possession and in some way the caps were discharged exploding the dynamite or powder, thus causing his death.

The company again wrote the mother on the 22nd of February. Responsive letters from the mother were tendered, but while the proper foundation was not laid for their introduction, they are not of sufficient materiality to change the conclusion we have reached.

March 23, 1916, the company received from an attorney at Enterprise, Miss., the home of the mother, a letter stating he had been employed to represent the mother in a claim for damages against the company, and offering to take \$5,000.00 in settlement of the claim. The company answered on the 25th, denying responsibility. On the same day, to-wit: March 25th, the above mentioned attorney wrote stating he was authorized to represent the mother and asked for a copy of the rules of the I. A. D.

There is another letter from the attorney under date of March 31, still urging settlement. On the 25th of July, appellant, Zeb A. Stewart, was appointed administrator of decedent's estate, and on the same day notified the company of his appointment, and asked if the company would be willing to settle his claim on behalf of the estate. Failing to effect a settlement he filed the present action August 10.

It was not until after a demurrer had been sustained to the petition and amended petition that appellant on April 19, 1917, filed a second amended petition, in which for the first time he alleged that a written claim or demand had been made upon the company for the payment of benefits under the I. A. D., claiming that a demand had been made by the mother, the attorney for the mother, and by the administrator, and also alleging that he elected to sue for benefits under the I. A. D. and released any claim which the estate might have to recover against the company for damages for the death of his decedent. No written demand for benefits under the I. A. D. was made on the company unless it be found in the telegrams and letters hereinabove referred to, and we do not think that in any one of these is there such a demand as is contemplated by the provisions of the I. A. D. It will be noticed that under sec. 14 no benefits will be paid to persons other than the administrator or executor of the estate of a deceased employe in trust for the widow, children or dependent relatives, nor will any benefits be paid "unless a written claim therefor be filed by the executor or administrator of the deceased employe with the board of management within three months after the employe's death." This was not done. As a matter of fact the administrator was not appointed for more than seven months after the accident to his decedent.

Furthermore, under sec. 20, "No person shall receive any benefit without first giving a written instrument evidencing an election to release all claims against the company arising out of the death." This was not done until April 19, 1917, when the second amended petition was filed, and which was more than sixteen months after the accident. Even though proper notice had been given we do not think appellant was entitled to recover.

Under section 20 the benefits of the plan are offered upon the express condition that all the rules and regulations shall be faithfully and strictly obeyed by the employes, "and a complete compliance with each and all such rules and regulations shall be and is a condition precedent to the right to receive any benefits whatsoever."

Rule 35 expressly and absolutely prohibits the practice of carrying explosives and caps in the same package, or storing them together. The death of decedent, according to the evidence, was due to a violation of this rule. When decedent was employed by the company he was given a copy of the I. A. D. and told to study it, and these rules were explained to him by the assistant mine foreman.

In addition to rule 35 the mine foreman testifies there was another rule that a man must carry the explosives, consisting of coalite powder and caps, separately, and the men were requested to wrap all caps in separate pieces of paper and not to carry any two caps together. The witness said he read this rule to decedent. The promulgation of this rule was due to the fact that powder and caps are liable to explode when wrapped together, and wrapping them separately makes them safe. The witness further testified that in his opinion decedent was an experienced miner.

The benefits of the I. A. D. were in reality a gratuity on the part of the company—a proposal to pay benefits under certain specified conditions, the consideration to be received by the company being the release from all claims for damages—and it was purely optional with the employe whether he accepted their benefits and conditions or not. It did not become a contract until its terms were accepted and complied with by the employe. Neither the employe nor the company is bound by any provision of the I. A. D. until the employe or the representative of his estate, in the event of death, gives to the company

a written acceptance or notice of their election to take under the I. A. D., and until this acceptance is given and election made the employe is privileged to prosecute his suit for damages against the company for any injuries received. In our judgment, appellant has not shown himself entitled to the relief sought. The terms and conditions of the I. A. D. were not met. There was in fact no contract. Within the meaning of the plan no written claim was made in three months, nor was there an election within that time evidencing an intention or desire to accept the benefits of the I. A. D., and to release the employer from all claims for damages. Decedent was not injured in the performance of his duties; on the contrary he was disobeying a rule enacted for the safety of himself and coworkers, a violation or breach of which was fraught with so much danger.

Counsel has cited a number of cases in support of his contention, but none of them involves a plan similar to the I. A. D. In each of the authorities relied upon it will be found the employe signed an application for membership or paid periodical sums or dues, thus entitling him to the benefits claimed, such as is instanced by the payment of a premium on a policy of insurance.

The contract sued on in each of the above cases will be found merely an obligation of the company to take charge of the fund raised by voluntary contribution, to administer it at its own expense and to guarantee that it shall be sufficient to furnish the specified relief. Such contract is not one of insurance, but has only the elements of a labor contract. Cooley on Insurance, p. 22. For example, reliance is placed on *Donald v. Chicago, B. & Q. R. Co.*, 93 Iowa 284, 61 N. E. 971. In this case the fund was obtained by a monthly assessment of its members, an amount being deducted from their salary, and the insured in this case agreed to be bound by the regulations of the relief department. And so in *Petty v. Brunswick & W. Ry. Co.*, 109 Ga. 666, 35 S. E. 82, to entitle an employe to participate in any of the forms of relief afforded by the department he was required to execute a prescribed form of application. Stipulated benefits were payable only upon compliance with the express condition that "there be first filed with the superintendent and chief surgeon of the relief and hospital department releases satisfactory to him, releasing each and all of the several companies constituting the Plant System from

all claims for damages from such injury or death, signed by all persons who might bring suit for damages, or those legally competent to release for them." In the other case of *Eckman v. Chicago, B. & Q. R. Co.*, 169 Ill. 312, 48 N. E. 496, the same department is involved here as in the Donald case, *supra*, and from which opinion we quote as follows: "Each member contributes monthly a specified sum according to the class to which he belongs, which is deducted from his wages, and placed to the credit of the relief fund. All employees of the company who pass a satisfactory medical examination are eligible for membership. . . .

"The regulations also provide a form of application which was used by the appellant, in which the appellant agreed to be bound by the regulations of the relief department; . . . that this application, on approval by the superintendent of the relief department, shall make him a member of the relief fund, and constitute a contract between him and the company . . . It also appoints the beneficiaries in case of death, and contains the following agreement: 'I also agree that, in consideration of the amounts paid and to be paid by said company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of their relief department, for damages arising from or growing out of said injury.' "

None of these cases involved a plan or contract similar to the I. A. D. The one very distinguishing feature between them being that in the latter no premiums or dues were paid by the employe; nor was an application ever signed by William Blanks, nor, as before stated, did he comply with the express terms and conditions of the plan.

The case nearest in point that we have been able to find is that of *McNevin v. Solvay Process Co.*, 53 N. Y. Supp. 98. Affirmed in 167 N. Y. 530, 60 N. E. 1115. The fund in this case was credited voluntarily by the company and was a pure gift on its part. The question under consideration in that court was when a sum is credited to an employe on the book furnished by the

company the employe had a vested right in the sum so credited, or whether under the terms by which the fund is established the employe acquires no vested right until the gift is completed by actual payment to the employe, and on this point the court says: "It must be conceded at the outset that a person or a corporation proposing to give a sum for the benefit of any person or any set of persons has the right to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute. Under the regulations established, it seems to me that none of the employes have a vested interest in any part of this fund, even though credited upon their pass books, until the gift is completed by actual payment. . . . In this case the defendant's trustee decided, after a hearing of the plaintiff, that the plaintiff was not, when the action was begun, entitled to payment of any portion of the fund credited to him, and it seems to me that under the terms of the gift this decision is final, unless, within the discretion of the defendant's trustee, it shall be modified in the future. In case it shall be held that this plaintiff had a vested right in the fund credited to his account, it would necessarily follow that it might be reached by his creditors through proceedings supplementary to execution, and thus the very object of creating the fund would be destroyed. . . .

"The plaintiff subscribed his name to the regulations, and promised to faithfully perform his work with a true loyalty to the interests of the company, and that during his term of service and after leaving the defendant's employment he would not use his knowledge of the company's business or processes to its injury or disadvantage."

The text of this case is quoted with approval is 26 Cyc. 1049, as follows: "Where the fund is contributed entirely by the employer, any rules which he makes regulating the disposition thereof are binding on the employe so that he has no rights therein except as provided for by such rules." See also *Geddis v. Lehigh Coal & Nav. Co.*, 39 Pa. Sup. Ct. 417.

In our judgment this is the rule that should be applied here. When the company offered its employes the benefits of the I A. D. it was privileged to attach such conditions to the payment of the benefits as it desired,

and there was no contract between the employe and the employer until the requirements of the plan had been complied with. We do not think the appellant has shown himself entitled to any of the relief sought in his pleadings. Decedent having left neither wife nor children, the only other person who could claim the benefits of the I. A. D. is a dependent relative. It is very doubtful if the mother has shown herself within the clause of "dependent relatives," but it will be unnecessary to discuss this phase of the case because of the conclusion we have reached on the other points involved.

Wherefore the judgment of the lower court is affirmed.

Cecil's Executors and Trustees v. Embry.

(Decided March 28, 1919.)

Appeal from Boyle Circuit Court.

Wills—Allowance to Contestants.—Contestants of a will are not entitled to an allowance out of the income of the estate, to enable them to prepare their contest, even though under the will they are entitled to support out of the income, and would be entitled to whole estate if the will is rejected.

CHARLES C. FOX, HENRY JACKSON, BAGBY & HUGUELY,
C. H. RODES & SON, C. D. MINOR, L. L. WALKER and SAMUEL
M. WILSON for appellants.

EDWARD C. O'REAR, FRANKLIN & TALBOTT, J. W. RAWL-
INGS and A. S. MOORE for appellee.

OPINION OF THE COURT BY JUDGE CLARKE—Reversing.

Granville Cecil died in 1915, leaving a will by which he disposed of an estate worth considerably more than \$200,000.00, the title to all of which he vested in his brother and another as trustees during the lives of his children and until his youngest grandchild becomes 21 years of age, when the property is to be divided among the descendants of his children. The trustees are charged with the entire management of the estate and out of the income therefrom are to pay to each of testator's three children "annually or half-yearly such sum or sums as they (the trustees) deem proper for the support of each."

The three children in this action are contesting the will upon the grounds of mental incapacity and undue influence, a judgment rendered in their favor in the circuit court having been reversed upon appeal to this court in an opinion reported in 176 Ky. 198, where a copy of the will and a more detailed statement of the facts may be found. After the return of the case to the circuit court, upon motion of the two daughters, their allowances for support were increased to \$4,200.00 annually, to correspond with the amount allowed by the trustees to the son, from which order there is no appeal, and upon motion of all three of testator's children, the trustees were ordered to pay to them out of the income the sum of \$1,500.00 to enable them to prepare for the trial of their contest of the will.

That the contestants of a will should be allowed in advance by the trial court, a lump sum out of the estate to enable them to make the contest, is truly a novel proposition, and we are cited to no authority of any kind in support thereof. Upon the other hand this court, in *Carter's Admr. v. Carter*, 12 S. W. 385, refused to approve such an allowance to an unsuccessful contestant, and in *Taylor, &c. v. Minor, &c.*, 90 Ky. 544, denied to a successful contestant expenses other than the costs which ordinarily follow a judgment. From which it appears, as seems only reasonable, that a contestant of a will must take the chances of losing his costs and expenses if unsuccessful, and if successful can recover costs exactly and only as any other litigant. This being true, an allowance in advance when it can not be known how the contest will terminate or with any degree of certainty how or for what the money will be expended, certainly can not be justified upon any theory of "costs" in the ordinary sense.

But, argue learned counsel, if contestants win, the whole estate is theirs, and even if they should lose, under the will and by the same authority as they were allowed \$4,200.00 each per year out of the income for ordinary necessary living expenses, they are entitled in addition as a necessary part of the support to which they are entitled, a sum sufficient to enable them to defend what they upon reasonable grounds believe to be their property rights, so that whatever the outcome of this action or in whatever light the situation is viewed, the allowance is justified as a proper exercise of the judicial authority.

Considering the proposition only upon the hypothesis that contestants may be unsuccessful, and not denying the possible soundness as a general rule, that the chancellor, but hardly the court trying a common law action, might, under many circumstances, upon proper application, require trustees to pay to those entitled to support out of the trust funds, as part of a reasonable support, a sum needed to assert or defend property rights or what reasonably seemed to be such, we are nevertheless firmly convinced such a principle would be wholly inapplicable where, as here, the purpose for which the funds are desired, is for an attack upon the very existence of the trust itself, under which the allowance is claimed; because, among other reasons, as said in *Carter's Admr. v. Carter, supra*, "if others than those to whom the testator has confided the control of his estate or the law has imposed the duty of probating the will, are allowed to contest the validity of last wills and testaments at the expense of the estate, cases would often arise that are now unheard of," and litigation would be wonderfully encouraged.

Although counsel attempt to show exceptional circumstances justifying the allowance here, these circumstances are but their reasons for believing their contest should succeed and afford no better ground for the allowance than could be urged in every will contest by those entitled to make it; and to sustain the contention here would establish a rule that would be applicable either to all such cases or to only such cases as the chancellor in his judgment thought ought to succeed, when the authority for determining this question is lodged with a jury on a common law trial, either of which consequences would be a perversion of both the letter and spirit of the law that requires all litigants to take their chances on the outcome and leaves them to their own resources and judgment to finance or refrain from litigation.

Wherefore, the judgment is reversed and the cause remanded with directions to set aside the order complained of and for proceedings consistent herewith.

Oyen v. Willings.

(Decided March 28, 1919.)

Appeal from Daviess Circuit Court.

1. **Master and Servant—Safe Place to Work—Assumption of Risk.**—It is the duty of the master to furnish the servant a reasonably safe place in which to perform his work, but if the place is unsafe and the danger in continuing the work is obvious and patent, the servant by continuing will assume the risk, and if injured, the master will not be liable.
2. **Master and Servant—Reliance Upon Knowledge of Master.**—If the master directs the servant as to the manner and method of performing the work, the servant has a right to rely upon the superior knowledge of the master and to assume that the performance of the work in the way directed will not be dangerous, unless the danger in performing it in that manner is so obvious and patent that an ordinarily prudent person would not undertake it, in which event the master will not be liable.
3. **Master and Servant—Obvious Danger.**—Where plaintiff with a heavy load on his shoulder undertook to cross over a rapidly moving belt about thirty inches high and ten inches wide, whereby he was thrown and sustained injuries, he can not recover of the master on the ground that he was directed to do so, since the danger in the undertaking was so obvious that a person of ordinary prudence and with due regard for his own safety would not have undertaken to carry out the directions of the master.

W. T. ELLIS, FLOYD J. LASWELL and W. FOSTER HAYS for appellant.

CLEMENTS & CLEMENTS and BEN D. RINGO for appellee.

OPINION OF THE COURT BY JUDGE THOMAS—Reversing.

The appellee and plaintiff below, Raymond Willings, was employed by appellant and defendant below, C. V. Oyen, as a member of the crew operating a dredge boat with which defendant was digging or enlarging a ditch in Daviess county, and while so engaged he sustained injuries to his leg and other parts of his body by which the leg between the knee and ankle was broken in one or two places and plaintiff was thereby rendered more or less a permanent cripple. He brought this suit against defendant seeking to recover damage for his injuries, alleging in substance that defendant failed to furnish him a safe place in which to do his work and that he had been directed by the foreman in charge to do the spe-

cific work at which he was engaged when he received his injuries in the way and manner in which he was performing it, which he alleged was dangerous and known by defendant's foreman to be dangerous, but which danger he himself did not know or appreciate.

The answer denied the negligence relied on and pleaded both contributory negligence and assumed risk, which, being denied, formed the issues, and upon trial the jury, under instructions from the court, returned a verdict in favor of plaintiff for the sum of \$2,000.00. Defendant's motion for a new trial having been overruled, he prosecutes this appeal, seeking a reversal of the judgment upon the two grounds that the court erred in overruling defendant's motion for a peremptory instruction in his favor, and having failed to sustain the motion for the peremptory instruction, the court misinstructed the jury to defendant's prejudice.

It appears from the testimony that defendant was engaged in cleaning out an old ditch, or rather making it deeper. The machinery employed was what is known as a dry land dredge, being a boat about eighteen or twenty feet wide and some thirty or thirty-five feet long, resting upon axles at either end, which at the time were about thirty-five feet long, with wheels on them, the dredge being astride the old ditch in which the work was being done. On the rear of the dredge was an engine and near the front end was the machinery to which the derrick was attached, as well as the wire ropes and other appliances which operated it. Between the engine and the derrick machinery there was a large belt or band running, with its lower ply about twelve inches from the floor of the dredge and its upper one, by actual measurement, thirty inches from the floor, although according to some of the witnesses who testified merely from observation the upper ply of the belt was something near twenty-seven inches from the floor. The wheels supporting the dredge ran on rails which were laid upon planks at the edges of the banks of the old ditch.

On the morning in question, about ten o'clock, the bank on the right side of the dredge was threatening to give way, and plaintiff and a fellow workman, whose duty it was to keep the track on that side in repair, were told by the foreman to procure some old plank with which to prop and hold the bank so that it would not give way. According to plaintiff's testimony the foreman directed

him to go on the other side of the ditch for the plank, but according to the testimony of the foreman and other witnesses introduced by the defendant no direction was given as to the place where the plank was to be obtained, there being evidence that there were planks suitable for the purpose on either side of the ditch. However this may be, the proof shows that the foreman directed the two to get two pieces of plank, and they went on the other side of the ditch, the plaintiff procuring two pieces, one seven and the other eight feet long, each being two inches thick and about ten inches wide, and started, with them on his shoulder, across the dredge and undertook to step over the belt in the space between the engine and the machinery at the front end at a point where the top ply was between twenty-seven and thirty inches from the floor. In doing so, with the load he had, his foot slipped, causing him to fall on the belt, it being in rapid motion, and received his injuries. His fellow workman, who preceded him, also stepped over the belt, but he was carrying only one small piece of plank, about three feet long, and he got across without sustaining an accident.

Plaintiff had been at work on the dredge for four days. He was reared upon a farm, and had worked in a coal mine and at a saw mill. At the latter place his work was in connection with the saw rig, and this gave him some experience in the operation of machinery, including belts.

It is insisted by plaintiff that the only practical way by which the dredge could be crossed from one side to the other was by stepping over the belt in the manner he did, while defendant's testimony shows that there was a way to cross the dredge at the rear of the engine and also in front of the crane, but to cross at the latter place it was necessary to step over a small wire rope about two feet from the floor and under another one about six feet from the floor, neither of which was being operated at the time, since the power from the engine was disconnected with the machinery operating the crane. Under these facts it is seriously insisted by plaintiff's counsel that the direction from the foreman to procure the plank was tantamount to a specific direction for plaintiff to go on the other side of the ditch and cross over the belt in returning with the plank, and that this case comes within the rule of the cases of *Runians v. Kelly & Brady Co.*, 141 Ky. 827; *L. & N. R. R. Co. v. Adams*, 148 Ky. 513;

Consolidation Coal Co. v. Moore, 166 Ky. 48; *Wasioto & Black Mt. R. R. Co. v. Hall*, 167 Ky. 819, and many others of like character from this court, it being contended that the servant in obeying specific orders from the master is not chargeable with unrestricted assumed risk in such cases because the presumed superior knowledge of the master as to the safety of the place or the method of doing the work will excuse him if under the circumstances he should undertake it.

The theory upon which the servant is relieved of the defense of assumed risk in the cases referred to, and under the circumstances contended for by plaintiff, is well stated in the *Runians* case, *supra*, wherein this court, quoting from *Sherman & Redfield on Negligence*, sec. 186, said:

"The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not *obviously* so dangerous that no man of ordinary prudence would have obeyed." Again, the court said: "This court has always made a distinction where the master or, as in the case at bar, the vice principal is present and gives directions to the servant to proceed with work which he knows to be dangerous. In such cases the master is liable, notwithstanding the fact that the servant is aware of the danger, unless the danger he is subject to in obeying the orders is so obvious that a person of ordinary prudence would not undertake it."

But for that restriction of the defense of assumed risk to apply for the benefit of the servant, two things must concur, viz., the servant must have been directed to do the particular work in the manner in which he was performing it, and the danger to which he is subjected in obeying the orders must not have been so obvious that a person of ordinary prudence would decline to undertake the work. Other cases announcing the same rule are *Hutchison v. Cohankus Mfg. Co.*, 112 S. W. (Ky.) 91, and *C. & O. Ry. Co. v. Shepherd*, Admr., 153 Ky. 350. The cases referred to and relied upon grow out of facts where the danger attendant upon performing the work in the manner directed by the master "is somewhat hazardous or dangerous, although not obviously so, or the danger of continuing is not so apparent that a

person of ordinary intelligence would not undertake it, and the servant is assured, in substance or effect, by the master who is present, that it is reasonably safe, or that there is no danger, or is directed by him to go on with the work." In such cases the servant is justified in accepting the assurance of the master, and will not be charged with assuming the risk if injury occurs.

As we have heretofore said, it is extremely doubtful whether there is any ground for the claim in this case that plaintiff, at the time of his injury, was performing his work under the direction of the foreman of the defendant, for it must be remembered that the foreman was not present with the servant while he was performing the work of going after the necessary planks. Neither did the foreman instruct him as to how he should get the plank from one side of the boat to the other, nor did he in any manner indicate to plaintiff that he should overload himself. On the contrary, plaintiff and his companion were told, according to the undisputed evidence, to get only two small planks. Moreover, the testimony preponderates to the effect that plaintiff could have crossed the boat at the rear of the engine, or, with slight inconvenience, could have crossed at the front end of the boat by stepping over the steel ropewhich was not then in motion, and passing under another in like condition about six feet from the floor. But, however this may be, the rule relieving the servant from the assumption of the risk in such cases, as we have seen, has no application where the danger attendant upon the work is so *obvious* that a person of ordinary prudence would not have undertaken it, although directed to do so by the master. *C. & O. R. R. Co. v. Shepherd*, Admr., *supra*; *Toler v. Swann-Day Lumber Co.*, 30 Ky. Law Rep. 810; *Hutchison v. Cohankus Mfg. Co.*, *supra*; *Kelly v. Barber Asphalt Co.*, 93 Ky. 363; *McCormack Harvester Co. v. Liter*, 23 Ky. L. R. 2154; *Davis v. C. & O. R. R. Co.*, 166 Ky. 490, and *White v. Louisville Gas & Electric Co.*, *idem*. 499.

In the *Toler* case the plaintiff was performing his work in the immediate presence and under the direction of defendant's manager and foreman. In that case defendant was engaged in the saw mill business, and a piece of timber caught in one of the saws. The foreman took hold of it and directed plaintiff to open some clamps. Back of the clamps was a circular saw in motion, and in

attempting to do his work plaintiff came in contact with the saw and was injured. He testified that he knew of the presence of the saw and that it was running, and that if he came in contact with it he would be injured, but he furthermore said that he was unacquainted with the danger attending the operation of saw mills. The court in denying the liability of the master said:

"The accident was altogether due to appellant's failure to exercise ordinary care for his own safety, and falls well within the line of *Wilson v. Chess-Wymond & Co.*, 25 Ky. Law Rep. 1655; *Duncan v. Gernert Bros. & Co.*, 27 Ky. Law Rep. 1039, and other like cases which hold that there can be no recovery by a servant for injuries received from obvious danger, when neither the premises nor the machinery is unsafe nor out of repair."

In the *Hutchison* case plaintiff sustained his injuries by his hand coming in contact with a cylinder studded with sharp teeth. It was right in front of him and he knew the liability of getting hurt if he came in contact with it. This court said: "Besides, it is not sufficient for a party seeking damages merely to state that he is inexperienced, or that he did not know of the danger. There are some things which a man of maturity must know. He must understand and appreciate the everyday laws of nature. He must know, unless he be shown to be of weak mind, that fire will burn, boiling water will scald, that a knife will cut, and that a revolving cylinder with sharp teeth will injure the hand if it is permitted to come in contact with it." The court then refers to and quotes from the cases of *Wilson v. Chess-Wymond Co.*, and *Kelly v. Barbour Asphalt Co.*, *supra*.

In the last named case plaintiff was injured by his shirt being caught in a revolving shaft over which he was required to bend in drawing buckets through an opening, and the court said: "It was revolving right before his eyes, which he was bound to see and did see while he was performing his duty. . . . It also conclusively appears that the only prudence that was necessary to be exercised in reference to this piece of machinery was to keep off of it, and that the common instincts of safety would have suggested to him to do that and the exercise of ordinary prudence would have enabled him to do that."

In the *White* case plaintiff sustained his injuries while removing a wooden horse from near the edge of a newly

dug trench by stepping so close to the edge of the trench that the embankment gave way, causing him to fall in it. A demurrer was sustained to the petition, and on appeal this court, in affirming the judgment, said:

"There is nothing in the petition to indicate that there was any hidden or unseen danger at the point where appellant alleges he fell into the ditch; on the contrary, it is apparent from the petition that the situation there was open and obvious, and whatever danger there was could have been seen and appreciated by any person of ordinary intelligence." Further along in the opinion the court, with approval, takes this excerpt from the case of *Wilson v. Chess-Wymond Co.*, *supra*:

"As said by this court, in the case of *Wilson v. Chess-Wymond Co.*, 117 Ky. 567, 'The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes and his most common experience and his earliest instincts to fully appreciate the danger of his position.'"

It is true that in the *Wilson* case the foreman was not present and directing how the work should be done. But if he had been, under the rule of the cases referred to, if the danger was so obvious that a person of ordinary prudence would have seen and appreciated it, the servant would have assumed the risk by continuing in the work. The dangerous nature of the circular saw in the *Toler* case, the shaft in the *Kelly* case and the newly dug ditch in the *White* case was no more obviously so than the rapidly moving belt in this case. Nor was the method of performing the work in either of those cases any more dangerous than the attempt of plaintiff in this case to cross the moving belt with a heavy load of lumber. Suppose that instead of the object attempted to be crossed being a smooth belt it had been a band saw, the danger in that case would have been different only in degree and not in kind. The servant would have been no more likely to come in contact with the saw in attempting to step over it than he would to come in contact with the belt in undertaking the same task. In the one case his injuries might have been more severe but none the more certain.

The case of *L. & N. R. Co. v. Adams*, *supra*, does not announce a different doctrine. In that case it is

said **that** the master will be excused if "under all the facts and circumstances the servant knows and realizes the danger, and with this knowledge and realization voluntarily assumes it."

The plaintiff in this case ran no risk of being discharged if he did not attempt to cross the belt with his load. He could easily have brought the plank to the belt and passed it over to his companion on the other side, admitting that there was no other way by which the lumber could be transferred from one side of the boat to the other. But even if he had to choose between losing his job and incurring the hazard of almost certain injury it was his duty to decline the undertaking and accept the consequences. Masters are not the insurers of the safety of their servants. They have a right to rely upon the principle of self-preservation actuating the servant in the performance of his work, and when the servant disregards that principle and blindly engages in an undertaking, which is patent, obvious and dangerous, he can not excuse himself upon the ground that the master alone is to blame. All machinery in operation is more or less dangerous if one comes in contact with it, and when the danger is active, as is true with machinery in operation, and is patent and reasonably certain, the common instincts of personal security should warn even the ordinarily intelligent to desist from an undertaking which would bring him in such dangerous contact. We think this case comes within the principle of the cases to which we have referred, and that the motion made by defendant for a peremptory instruction in his favor should have been sustained.

Wherefore, the judgment is reversed, with directions to grant a new trial, and for proceedings consistent herewith.

**Bosworth, Auditor, et al. v. Kentucky Highlands
Railroad Company.**

Cases Nos. 26761, 26999, 28160, 28563.

(Decided March 28, 1919.)

Appeal from Franklin Circuit Court.

Taxation—Assessment of Franchise—Injunction—Pleading.—In an action to enjoin the Board of Valuation and Assessment from

assessing the franchise of a corporation at a sum greater than that fixed in the petition, a general demurrer confessed the truth of the allegations, and there being no other plea to the petition seeking the relief, and it stating a cause of action the demurrer was properly overruled and the relief prayed for properly granted.

CHARLES H. MORRIS, Attorney General, and JOHN C. DUFFY, Assistant Attorney General, for appellants.

T. L. EDELEN for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

These four actions were instituted in the Franklin circuit court by the Kentucky Highlands Railroad Company to obtain injunctions against the Board of Valuation and Assessment and its members, restraining it and them from assessing its franchise and capital stock at greater sums than those fixed in the four petitions. The first action was brought on October 31, 1913, to enjoin Auditor Bosworth and the other members of the Board of Valuation and Assessment from fixing the value of its franchise at \$473,755.00, or any sum in excess of \$64,635.00, which the petition alleged was the fair cash value thereof. A general demurrer was interposed to the petition and, after hearing, was overruled, and the defendant Board of Valuation and Assessment declining to plead further, a decree was entered in favor of the plaintiff perpetually enjoining the board from fixing the franchise of the plaintiff company at any amount in excess of \$125,000.00, and fixing said amount as the value of plaintiffs' franchise for the purposes of taxation for the year 1913. No objection was made to or exception taken or saved by either party to this judgment, which was entered January 28, 1916. As the alleged value of the franchise was only \$64,635.00, and there was no answer or other response to the petition except the general demurrer, we are at a loss to understand how the court entered a judgment fixing the value of the franchise at \$125,000.00, unless it was by agreement or consent of the parties, and this we are assured is the fact by appellee railroad company. If that be true, then this appeal should not have been prosecuted by the special attorney for the Commonwealth.

The second case was instituted July 24, 1914, and the allegations of the petition are in substance the same

as those in the first action, but this suit seeks to enjoin the board from making a final assessment of plaintiff's capital stock at \$700,000.00, or any sum in excess of \$125,000.00, which the petition avers is the actual cash value thereof. A general demurrer was also interposed to this petition and overruled, and the board again declining to plead further, a decree was entered in favor of the railroad company, enjoining the defendant Board of Valuation and Assessment from fixing the franchise of the plaintiff company at any amount in excess of \$125,000.00, and that amount was adjudged to be the value of said franchise for the year 1914 for the purposes of taxation. No objection or exception was saved to this judgment by either party.

The third suit was commenced on June 19, 1915, and the prayer is for a perpetual injunction restraining the Board of Valuation and Assessment from fixing the value of its capital stock at \$700,000.00, or any amount in excess of \$125,000.00, which it alleges is the fair cash value of its franchise. While no general demurrer to the petition was offered or filed, the decree treats the proceedings as though one had been so filed and overruled, and the defendant board, for the third time, declining to answer or plead further a decree was entered granting the relief sought, and enjoining the board from fixing the valuation of the capital stock at any sum in excess of \$175,000.00. No objection was made or exception saved to this judgment by appellants.

The fourth action was instituted on September 18, 1916, and is in substance the same as the other three. The prayer, however, asks an injunction, restraining the board from fixing the value of the capital stock of the railroad company at "\$898,294.00, or any amount in excess of that which, deducting the value of its tangible property, will leave the value of its franchise at \$175,000.00, which plaintiffs aver is in excess of the actual value of its franchise, but upon which plaintiff is willing for the assessment to be made." No demurrer or answer was filed by the board to this petition and the board, failing to plead, the petition was taken for confessed, and a decree entered in accordance with the prayer of the petition, fixing the value of the franchise at \$175,000.00, and enjoining the board from fixing the value of the franchise at \$898,294.00. The appellants objected and excepted to this judgment and prayed an

appeal to this court, which was granted. This is the only decree in the four to which objection was made or exceptions saved by appellants and the only one granting an appeal.

Appellee company has filed its written motion in each of said cases to dismiss the appeals on the ground that "the judgments rendered herein were rendered by consent of the appellee and the Honorable M. M. Logan, representing the appellants, who was then the duly qualified and acting Attorney General of the Commonwealth." It also filed a verified "answer to the appeal" in each case in which it says, "that although it may appear from the judgment herein that an exception was reserved by the defendants, said judgment was rendered with the full consent of the Honorable M. M. Logan, who was then the Attorney General of the Commonwealth of Kentucky, after a full hearing before the Franklin circuit court, and that afterwards this appeal was prosecuted by the Honorable John C. Duffy, styling himself the Special Assistant to the Attorney General, and without, as the appellee believes, being especially authorized therein by the Attorney General." The judgments in the first three cases appear to have been entered by consent of all parties. There is no objection or exception to the decrees, and no appeal asked or granted. Then, too, it appears that the amount at which the value of the franchise was fixed in the first suit was \$125,000.00, whereas the allegations and prayer of the petition would have justified a judgment for only \$64,635.00. From these facts we are persuaded that the judgment must have been entered by consent of the parties, although this is denied by special counsel for the Commonwealth, but we find no denial by Honorable M. M. Logan, who was Attorney General of the Commonwealth at the time and later chairman of the Tax Commission of the Commonwealth, and therefore, a party to this action.

Passing the motion to dismiss the appeals, and all other preliminary questions, we will consider only the main question in all of the cases: Did the petitions state causes of action? If they did, the general demurrers were properly overruled; if they did not, then the court erred to the prejudice of appellants in overruling the general demurrers. The petitions are almost identical, and what may be said of one may be said of all. Let us consider

the sufficiency of the allegations therein made, and determine whether causes of action were stated thereby. After manifesting its right to sue as a corporation, and its right to sue the defendants named, appellant alleged in each of the petitions that the Kentucky Highland Railway Company is a Kentucky corporation, and that it owns 15.88 miles of railroad track and certain equipment; that it operated at the times mentioned in the four petitions only 6.46 miles of said road, and the residue of said track was then, and had been at all times since its construction, held and operated by the Louisville & Nashville R. R. Company, and this last named concern had returned said part of plaintiff's track to the taxing authorities of Kentucky for taxation as a part of its system, and had paid all taxes thereon, and at the time of the institution of these actions had declared its liability for further taxes and was ready, able and willing to pay any additional tax due, if any, assessed on said mileage for franchise for the years named, and was in fact so assessed at each and all of the times mentioned in the petitions. The petitions also aver that the railroad begins at Cliffside, near Frankfort, in Franklin county, and extends to Versailles, in Woodford county, 4.21 miles being in Franklin county and the balance in Woodford county; that the company is capitalized at \$250,000.00; that it has a bonded debt secured by mortgage upon its railroad from Frankfort to Millville of \$250,000.00, which bonds become due in April, 1947; that it owes the Louisville & Nashville R. R. Co. a floating debt of \$526,063.52; that the value of its tangible property did not exceed, for the years named, \$76,245.00; that the fair value of its entire capital stock did not exceed for the years named \$126,000.00; that the Board of Valuation and Assessment for the year 1913, proposed to fix the value of its capital stock at \$500,000.00, and the value of its tangible property at \$76,245.00, thus automatically fixing the value of its franchise at \$423,755.00. For the years 1914, 1915 and 1916, in which the other suits were brought, the Board of Valuation and Assessment proposed to fix the value of the capital stock of appellee at \$700,000.00, and the value of its tangible property at approximately \$75,000.00, which would automatically fix the value of the franchise, and these facts were sufficiently alleged in the petitions. It is also alleged that the proposed assessment by the Board of Valuation and Assessment was tentative

only and not final; that while, through certain manipulations of the books of appellee, the net earnings of the road were made to appear as \$44,258.77, the said sum was not, in truth and in fact, the exact net earnings of the road, but that said sum was subject to several deductions: (1) the interest upon the floating debt of \$526,063.52; (2) a sinking fund for the extinguishment of the bonded debt; (3) such proportion of its franchise as the distance from Millville to Versailles bears to the total mileage. The Board of Valuation and Assessment fixed the value of its capital stock at \$500,000.00 for 1913, and at \$700,000.00 for the years 1914, 1915 and 1916; but notwithstanding appellee's protest the board sent to appellee a notice fixing the value of its capital stock at the sum aforesaid, and therefore fixing the value of the franchise by taking the value of the tangible property from the value fixed upon its capital stock, as aforesaid; that such assessment was greatly in excess of the real value of the capital stock and of the franchise, and was an assessment of at least four or five times the actual value of the stock and franchise, and that if such assessment be enforced, would result in spoliation of the property of the railroad by collection from it of taxes upon the franchise far in excess of its actual or fair value, which is alleged to be only \$64,635.00 for the year 1913, \$125,000.00 for the year 1914; \$215,000.00 for the year 1915, and \$175,000.00 for the year 1916; that the board is attempting to and will enforce the collection of taxes from appellee upon the valuation which it tentatively fixed upon its franchise, and unless enjoined and restrained from so doing, will certify said sums as the value of said franchise and capital stock of appellee, and cause taxes to be collected accordingly. The petitions also contained the necessary allegations concerning the application for injunction, and concluded with a prayer for a perpetual injunction, restraining the Board of Valuation and Assessment from fixing the value of the franchise and the value of the capital stock of appellee at sums greater than those named in the petitions. The general demurrers confessed the truth of the allegations and there being no traverse or other plea the petitions manifested a right on the part of the railroad to the relief sought.

It is the contention of appellant that the proper mode to arrive at the value of the franchise of the railroad

company is to find the difference between the net earnings and the gross earnings thereof, and capitalize that sum at six per cent, and the amount so found, less the value of the tangible property, will be the value of the franchise, subject to taxation. The railroad company insists that the mode adopted by this court in several cases is to find the value of the capital stock of the corporation, and from this take the value of the tangible property, and thus automatically fix the value of the franchise.

The value of the franchise of a domestic corporation is the difference between the fair cash value of the capital stock and the assessed value of its tangible property. To arrive at the value of the franchise the value of the tangible property must be deducted from the fair cash value of the capital stock of the concern. *Kentucky Heating Co. v. City of Louisville*, 174 Ky. 142.

By sections 4079 and 4080, Kentucky Statutes, the mode of finding and fixing the value of a franchise of a railroad, organized under the laws of this Commonwealth, is pointed out though not as clearly as it could or should have been. Reading these two sections together, we conceive the fair import to be, the Board of Valuation shall fix the value of the capital stock by capitalizing the net income derived from the business in this state and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, and the remainder thus found shall be the value of the corporate franchise subject to taxation.

The method of ascertaining and fixing the value of the franchise of appellee company is not set forth in the petitions nor was it necessary to do so, but the value of the franchise is definitely alleged at so many dollars for each year. The averments of the petition as to the value of the franchise are direct and certain. Uncontroverted these allegations were properly accepted by the trial court as the basis for the decrees entered. The petitions stated a cause of action entitling the railroad to the relief prayed, and the general demurrers were properly overruled.

Judgment affirmed.

Clay's Committee v. Washington, et al.

(Decided March 28, 1919.)

Appeal from Bourbon Circuit Court.

1. **Appeal and Error—When Right to Prosecute Appeal Will Cease—Options.**—Where the appellant elects to avail himself of one of two options given him by a judgment to which he excepts and from which he appeals, and the exercise of either option deprives him of a part of the money or property for which he sued, the taking by him of either option does not end or obstruct his right to take or further prosecute the appeal. It is only where he has compromised and settled the demand sued for or matter in controversy with the appellee in satisfaction of the judgment so as to free the parties from its coercive provisions; or where, pending the appeal, conditions have arisen that would make the judgment of the appellate court of no legal effect, that the right to further prosecute the appeal will cease.
2. **Homestead—How Debtor Entitled to Homestead.**—In order to entitle a debtor to a homestead exemption in real estate, of which he is the owner, seized for debt, he must be a bona fide housekeeper with a family in possession of, i. e., residing upon, the property, claiming it as a homestead when levied upon by the attaching or execution creditor; or if not in possession his absence must be temporary and with the fixed intention or purpose existing at the time of leaving it to return to and occupy the property as a homestead. Moreover, he must have acquired the property prior to the creation of the debt or demand to satisfy which it is sought to be subjected to sale.
3. **Homestead—Abandonment—Exemption.**—Although the debtor may, after acquiring a homestead in real property, before the creation of the debt, leave it temporarily with the intention to return to and occupy it as a homestead, and even carry such intention into effect by later returning to and occupying the property, if after doing so he abandons it as a homestead and removes to and occupies another piece of property of which he is the owner, and which he acquired after the creation of the debt, with the intention to make it his homestead instead of the property from which he removed, in such event he will not be entitled to a homestead in either piece of property as against the debt of the creditor, and both may be subjected to its payment, unless the second piece of property was purchased with the proceeds of the sale of the first property, in which event it would be exempt from the debt if worth no more than \$1,000.00; but if worth more than that sum, only \$1,000.00 of its value would be exempt to the debtor.
4. **Homestead—Evidence.**—Evidence in this case examined: Held, that the debtor, a woman, is not entitled to a homestead in either

of the two lots levied upon and sold in satisfaction of the debt of the execution creditor.

EMMETT M. DICKSON for appellant.

TALBOT & WHITLEY and HARMAN STITT for appellees.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellant, H. C. Howard, as committee of George Clay, a person of unsound mind, in an action brought in the Bourbon circuit court, recovered of the appellees, Alfred Washington and Sara Washington, husband and wife, a personal judgment for \$5,000.00. An execution was issued on the judgment and levied upon two lots as the property of the appellee, Sara Washington, both situated in the city of Paris, one of them on Thomas avenue and the other on Hanson street; the first containing a one-story and the second a two-story frame dwelling house. Preliminary to their sale under the execution the lots were duly appraised, the value of each being placed by the appraisers at \$900.00. When sold under the execution both lots were purchased by the appellant, the Thomas avenue lot at \$1,000.00 and the Hanson street lot at \$1,200.00.

As each lot brought more than two-thirds of its appraised value, the sheriff, by deed made shortly after the execution sale, conveyed the lots to appellant in his official capacity, and the latter, in order to obtain possession of them, applied to the Bourbon circuit court for a writ of *habere facias possessionem*, of which appellees were given due notice.

By written notice given appellant and the sheriff on or before the sale of the lots under the execution, and also by her answer to appellant's motion for the writ of possession, the appellee, Sara Washington, claimed a homestead in one or the other of the lots, alleging that she was a *bona fide* housekeeper with a family, consisting of herself and husband; that she had acquired by its purchase by her for that purpose and her occupancy of the Thomas avenue lot, a right of homestead therein long before the creation of the debt for which appellant obtained judgment against her, which right of homestead, notwithstanding her removal from the Thomas avenue lot to the Hanson street lot, and occupancy of the latter lot at the time of the institution of the appellant's action

against her, she had not abandoned or lost, or that if lost in the Thomas avenue lot, such right of homestead had been transferred to and existed in the Hanson street lot. The affirmative matter of the answer was controverted by reply.

On the hearing of the motion for the writ of possession, the circuit-court rendered the following judgment:

"The court declines to sustain the motion of the defendant, Sara Washington, filed herein Nov. 13, 1916, supported by her affidavit, filed herein on the same date in reference to the introduction of further proof, and overrules said motion, to which the defendant, Sara Washington, excepts and the court being advised is of the opinion, and so adjudges, that the defendant, Sara Washington, acquired a homestead right in the following real estate, to-wit:

"Also that other certain property in Paris, Bourbon county, Kentucky, known as lot No. 1, Higgins' subdivision, being 50 feet on McCann (or Thomas) avenue and 113 feet, more or less, on Williams street, and is bounded on the south by lot No. 3, on the east by the Prewitt property and is the same property conveyed by John W. Childers, by the master commissioner of the Bourbon circuit court to the Economy Building and Loan Association of Paris, Kentucky, and by it conveyed to Sara Washington, by deed recorded in deed book 83, page 114, in the Bourbon county clerk's office," and that said homestead right was so acquired long before the creation of the liability sued on herein and represented by the judgment herein, and that the plaintiff cannot look to both pieces of real estate herein, freed from all homestead rights to satisfy his judgment, as plaintiff has undertaken to do. The court is further of the opinion, and adjudges, that the defendant, Sara Washington, in moving into the improvements on the other parcel of real estate sold herein, took with her a homestead exemption so acquired, to the extent of the value of the above described real estate in which she first acquired a homestead right, and it appearing to the court from this record that the above described property, in which she first acquired a homestead right, was sold for \$1,000.00 and there being no other proof of its value, it is adjudged that the defendant, Sara Washington, in moving into the improvements on the other property now occupied by her, described below, and which, as it appears from the record, was sold

for \$1,200.00, took with her a homestead exemption to the extent of \$1,000.00.

"It is accordingly adjudged that the plaintiff is entitled to a writ of possession of both parcels of real estate sold herein, but the plaintiff is required to pay to her, or her attorneys, Talbott & Whitley and Harmon Stitt, the value of her homestead right, to-wit, \$1,000.00 before the writ of possession shall issue as to the last parcel, known as the Jones property in which defendant resides and described as follows:

"A certain house and lot of ground situated in Paris, Bourbon county, Kentucky, on Hanson street, fronting on Hanson street 100 feet, more or less, and extending back to Gano street 290 feet, more or less, and adjoining the property of R. H. Maddox, Lettie Masterson, Thomas Samuels, Ben Hawkins and Ed Hutsell, being the same property conveyed by Martha Jones by deed of date Sept. 15th, 1913, of record in the office of the clerk of the Bourbon county court, in deed book 100, page 180.

"Comes defendant and consents and offers to permit the plaintiff to surrender to the defendant said real estate first described above in which defendant is adjudged to have first acquired a homestead right before the creation of the liability herein, in lieu of plaintiff paying the defendant the \$1,000.00 aforesaid, and in that event the plaintiff may have a writ of possession for the last tract without the payment of the \$1,000.00 aforesaid. If the plaintiff declines this offer, plaintiff may have writ of possession of the first parcel above described at once and a writ of possession of the second parcel in which defendant resides, upon payment of the homestead exemption of \$1,000.00 as aforesaid. But if the plaintiff accepts the above offer the plaintiff will release and surrender to defendant the first described tract and may have a writ of possession at once for the second described tract.

"To all of which the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted."

Appellant filed motion and grounds for a new trial of his motion for a writ of possession for the lots, but the motion was overruled. From this ruling and the judgment previously entered, he prosecutes this appeal.

Appellees, after due notice thereof to appellant, have entered in this court a motion to dismiss the appeal on

the ground set forth in a verified answer filed in support of the motion, which is, that appellant, by his exercise of the option given him by the judgment of the circuit court to accept the appellee, Sara Washington's offer to surrender to him the Hanson street property upon his surrendering to her as a homestead the Thomas avenue property, followed by his surrender to her of the possession of the Thomas avenue property and her surrender to him of the possession of the Hanson street property, was such an acceptance of a benefit conferred by the judgment as estops him to complain of its provisions or ask its reversal; hence, the act should be held to constitute an abandonment of his appeal.

We are unable to find any merit in this contention. Civil Code, section 575, provides: "If it appears from the record that an appeal was improperly granted, or that the appellant's right to prosecute it further has ceased, the appellee may, upon stating the grounds in writing, move the court to dismiss the appeal." . . .

By an act passed in 1888, this section was amended by adding to it these further provisions: "But where a party recovers judgment for only part of the demand or property he sues for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover."

In numerous cases involving the construction or application of this section, we have held that accepting satisfaction of a judgment where the party only recovers part of what he sued for, does not prevent him from appealing. *Combs v. Bates*, 147 Ky. 849; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633; *Nashville C. & St. L. Ry. Co. v. Bean's Exr.*, 128 Ky. 758.

The fact that the party appealing has availed himself of whatever benefit the judgment complained of allows him, does not, as argued by appellee's counsel, destroy his right to prosecute the appeal from so much of the judgment as refused him in part the recovery or relief sought. It is only where he has compromised and settled the demand sued for or matter in controversy with the appellee in satisfaction of the judgment, or so as to free the parties of its coercive provisions, or where, pending the appeal, conditions have arisen that would make the judgment on the appeal of no effect, that the right to prosecute it will cease. *Whittle v. Rawleigh*

Medical Co., 177 Ky. 1; Ohio River Contracting Co. v. Pennybacher, 168 Ky. 78; Madden v. Madden, 169 Ky. 367; Haggen v. Montague, 125 Ky. 507.

Here the appellant, by the judgment appealed from, recovered but a part of the property for which he sued, and that he obtained only by exercising an option imposed by the judgment, the exercise of which compelled him by its terms to surrender to the appellee, Sara Washington, the remainder of the property. In fact the judgment gave him two options. The one mentioned of which he availed himself, and the other giving him the right to take both pieces of property by first paying appellee \$1,000.00, in lieu of a homestead, the result of the taking of either option being alike coercive upon appellee. If, instead of availing himself of the option he exercised, appellant had taken the other and paid Sara Washington the \$1,000.00, in order to obtain both pieces of property, could it be contended that his act, in so doing, would have deprived him of the right of appeal from the judgment? Manifestly, such would not have been its legal effect, and no logical reason can be assigned in support of the contention that his exercise of the option of which he availed himself, should be given the legal effect claimed for it by appellees.

It is also manifest that if the judgment should be reversed with direction to the circuit court to require delivery to appellant of the lot which, as the result of his exercise of the option, was surrendered to appellee, that court, upon the return of the case, would have such jurisdiction of the parties and control of the property as would enable it to compel delivery of the possession of the latter to appellant in obedience to the mandate of the appellate court. On the other hand, if the judgment should be affirmed, the appellees, who have no cross-appeal, would be left in the situation in which the judgment placed them and would continue in possession of the property they now hold. So it is clear that there has been no change in the condition of the property or situation of the parties, arising from appellant's exercise of the option accorded him by the judgment of the circuit court, that can have the effect to bar his right to further prosecute the appeal.

In addition to what has been said, we find that the written notice of his intention to avail himself of the op-

tion in question, given by appellant to appellees, distinctly rests the act upon the requirement of the judgment and contains no intimation of its being intended as a compromise or settlement of his claim to the lot surrendered to appellee, or as an abandonment of his right to prosecute his appeal, which was granted by the judgment containing the option. It follows from the conclusions we have expressed that appellant's right to prosecute this appeal has not ceased; therefore, the motion of appellees to dismiss the appeal is overruled.

It yet remains to be determined whether the appellee, Sara Washington, had a right of homestead in either of the lots at the time of the levy of the appellant's execution upon them or when they were sold thereunder. And to the decision of this question we will now proceed. No doctrine is better settled in this jurisdiction than that the debtor, in order to be entitled to a homestead exemption in property, of which he is the owner, seized for his debt, must be a *bona fide* housekeeper with a family and in possession of the real estate when levied on by the attaching or execution creditor, claiming it as his homestead; or, if not in possession, his absence from it must be temporary and with the intention to return to and occupy it as a homestead. Moreover, he must have acquired the property prior to the creation of the debt or demand, to satisfy which it is sought to be subjected to sale. Ky. Stats., section 1702; *Nichols v. Sennett*, 78 Ky. 630; *Hensey v. Hensey*, 92 Ky. 164; *Holder v. Holder*, 120 Ky. 802; *Carter, Fisher & Co. v. Goodman*, 11 Bush 228; *Brown & Co. v. Martin*, 4 Bush 50; *Caldwell, etc. v. Truesdale*, 11 R. 726. If the homestead is once acquired the length of the time of absence from it is not so material, but it must be temporary in the sense that it begins and continues with a fixed purpose on the part of the claimant of the homestead to return to the property and occupy it as a homestead. *Mattingly v. Berry*, 94 Ky. 544; *Burch v. Atchison, etc.*, 82 Ky. 585; *Curran v. Culf, Admr.*, 13 R. 84; *Nethercutt v. Herron, etc.*, 10 R. 247.

We think it sufficiently appears from the evidence furnished by the record that the appellee, Sara Washington, by her purchase of, and removal to, the Thomas avenue lot in 1900 and continued occupancy of same for the two years succeeding the purchase, did acquire a homestead in that property. For she testified that she purchased

it with that purpose and for the two years occupied it as a homestead, and this testimony is not contradicted by any other witness. She and her husband, at the end of their two years' occupancy of the Thomas avenue property, went back to the service and home of their employer, George Clay, with whom they had previously lived, and after remaining with him until 1913 returned to the Thomas avenue property. Notwithstanding their stay of ten or eleven years at Clay's, in view of the testimony of the appellee, Sara Washington, that she left the Thomas avenue property with the fixed purpose to return thereto when her employment by Clay had ceased, we would not be inclined to hold that this long absence from the Thomas avenue property necessarily constituted an abandonment of that property as a homestead; for such absence, as long as it was, cannot be said to be necessarily inconsistent with a fixed purpose on appellee's part to return to her own property as a permanent place of residence when her employment by Clay should cease.

But whatever purpose she may once have entertained respecting her return to the Thomas avenue property as a permanent place of residence, her acts and conduct before leaving the Clay home and following her return to the Thomas avenue property, make it reasonably plain that such purpose had been abandoned before her return thereto. For in giving her testimony she frankly admitted that her purchase of the Hanson street house and lot was made shortly before her removal from Clay's; that the purchase was made by his advice and with a part of \$5,000.00, given her by him; and that the \$5,000.00 thus given her by Clay is the same money for which the appellant, as his committee, recovered against her the judgment compelling the sale of her two lots under the execution.

She further admitted that her object in buying the Hanson street lot with its two-story dwelling house, was to make of it a home for herself and paralytic husband; that upon leaving the Clay place they would have moved directly to the Hanson street property, but for the fact that a tenant then in possession of it had not removed from it as anticipated, for which reason she and her husband temporarily removed to the Thomas avenue property, taking with them a part of their household effects, having previously caused the remainder to be

hauled to and left at the Hanson street house. It also appears from Sara Washington's testimony that she and her husband, following their removal thereto, remained in the Thomas avenue property about one month, and until the Hanson street property was vacated by the dilatory tenant, and then removed to the Hanson street property, where they were residing when sued by appellant, and continuously resided, until their surrender of the property to appellant, when he surrendered to them the Thomas avenue property under the option given him by the judgment of the circuit court.

The evidence referred to clearly establishes the following facts, viz.: (1) that whatever homestead right the appellee, Sara Washington, once had in the Thomas avenue lot had been abandoned by and lost to her before the levy of appellant's execution and sale of the property thereunder; (2) that when she removed from the Thomas avenue lot to the Hanson street lot, it was with a fixed purpose to abandon the first property as a homestead and make a permanent home of the second; which purpose, as admitted both by her answer and testimony, actuated her purchase of the latter property before she left Clay's, and was consummated by her subsequent removal to, and occupancy of it; (3) that she had no right of homestead in the Hanson street lot at the time of the levy of the execution because the debt for which the lot was sold was created before the lot or any right of homestead therein had been acquired by her.

While in every case involving a claim to homestead, the question of abandonment, if raised, must be determined by the facts established in evidence in the particular case, in the case before us there is no doubt of the appellee, Sara Washington's, abandonment of her right of homestead in the Thomas avenue property, because the abandonment is admitted by her. It is her claim, however, that her homestead in that lot was by some unaccountable means transferred to the Hanson street lot, or if not so transferred, it reattached to the Thomas avenue lot. According to our interpretation of the statute the homestead of the debtor cannot, by his or her own volition, be thus shifted from one piece of property to another. The right of exemption depends upon the actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for him-

self and family; and the right does not exist where the residence of the debtor is permanently located elsewhere than on the property in which the homestead is claimed. Our view of the law on this question is well stated in 13 Ruling Case Law 546: "It is clearly a perversion of the spirit and purpose of the homestead exemption to allow a double immunity against the claims of creditors. Hence, it is a rule of universal application that a person cannot lawfully hold two exemptions at the same time; nor can he have two homesteads, either of which, at his election, would be exempt . . . In as much as one person cannot hold two homesteads at the same time, the removal from one homestead elsewhere is conclusive proof of abandonment of the former homestead." To which we would add, provided the removal from the one homestead elsewhere, is made with a fixed purpose on the part of the debtor to abandon as a homestead the property from which he removed and permanently make his home on the property to which he removes; and such is the state of case here presented.

The circuit court, by the judgment appealed from, seems to have sustained appellee's contention that the homestead in the Thomas avenue property was not abandoned by Sara Washington but, to the extent of \$1,000.00, its value, was merely transferred by her to the Hanson street property, thereby giving her a right of election, which the law does not permit. A debtor may sell his exempt homestead and invest the proceeds in other real estate, which, if claimed by him and occupied by himself and family as a homestead, cannot be subjected to the payment of his debts. But the case here presented does not rest upon any such state of facts. The Hanson street lot was not purchased with the proceeds of any other homestead, and though avowedly purchased as and for a homestead, was paid for with money otherwise acquired. Its purchase for such purpose and appellees' removal to it as a permanent home, necessarily operated as an abandonment of their homestead in the Thomas avenue property, without having the effect of exempting to them a homestead in the Hanson street property, as it was acquired after the creation of the debt for which it was sold under the execution. Furthermore, appellees' abandonment of their homestead right in the Thomas avenue property rendered it as much subject to the execution debt as was the other property.

The errors shown by the judgment were not cured by the options it gave appellant, as the effect of his availing himself of either option, could but cause the loss to him of a part of the debt sued for.

For the reasons indicated the judgment is reversed and cause remanded for such further proceedings as may be consistent with the opinion. The whole court sitting.

O'Bryan, et al. v. O'Bryan, et al.

(Decided March 28, 1919.)

Appeal from Bullitt Circuit Court.

1. **Execution—Purchase of Land at Sheriff's Sale Under Execution—Lien—Title.**—One in possession of land by its purchase at a sheriff's sale under an execution against the owner and a deed from the sheriff, will, prima facie, be entitled to it as against a lien asserted upon it by another by virtue of a mortgage on the land; made after the purchaser at the execution sale received his deed from the sheriff by one claiming to own it as a vendee of the execution debtor under a deed from the latter. But where it is made to appear that the land had, by a deed of record from the execution debtor, been conveyed the mortgagor before the judgment of the execution creditor against the execution debtor was obtained or before levy of the execution, although after the institution of the action, the mortgage lien asserted by the mortgagee would be superior to the title of the purchaser at the execution sale, unless, as here alleged by the latter, such deed and the mortgage thereafter executed were fraudulently made to defeat the debt of the execution creditor, of which there is no satisfactory proof in the record of this appeal.
2. **Appeal and Error—Equitable Actions—Reversal.**—Ordinarily an equitable action will, on appeal, be finally disposed of by the appellate court and, if the judgment is reversed, remanded with direction to the lower court to enter such final judgment as will conform to the opinion of the appellate court. But where, as here appears, the case was prematurely tried in the court below, with respect of which the parties were equally at fault, and on the appeal the confused state of the record renders it practically impossible for the appellate court to intelligently determine the rights of the parties, that court, to prevent injustice to any of them, will reverse the judgment and remand the case for the necessary preparation and another trial in the circuit court.

BEN CHAPEZE for appellants.

J. R. ZIMMERMAN for appellees.

OPINION OF THE COURT BY JUDGE SETTLE—Sustaining the appellants' petition for a rehearing, withdrawing former opinion and reversing judgment.

Feb. 4, 1919, an opinion was handed down in this case affirming the judgment appealed from. On March 3, 1919, appellants filed a petition asking a rehearing of their appeal, by which our attention has been called to certain errors appearing in the opinion, mainly as to dates, which from a further examination of the record we find it necessary to correct, and the correction of which will necessarily result in the reversal, instead of an affirmation, of the judgment of the circuit court.

The case was so poorly prepared for trial in the circuit court and the record filed on the appeal is so inadequate in its showing of the facts relating to the controversy between the parties, particularly as to the matter of dates material to a proper understanding of the case, that we have found it difficult to arrive at a satisfactory solution of the questions we are asked by the briefs of counsel to decide. The case seems to have been decided by the court below out of term time, for we find in the record an order showing that by agreement of counsel representing the respective litigants, the papers of the cause were to be sent to the judge of the Bullitt circuit court for its trial between terms elsewhere than at the county seat, with leave to the parties to take proof and file certain exhibits in the meantime. And, while it is reasonably apparent from the record that proof was taken, neither such proof nor the exhibits agreed to be filed appear in the record brought to this court.

Briefly stated, the facts out of which this litigation arose are as follows: One James C. O'Bryan died in 1909, intestate, survived by his wife, America J. O'Bryan, and three sons, J. E. O'Bryan, J. R. O'Bryan, and C. T. O'Bryan. The widow was appointed and duly qualified as administratrix of the decedent's estate under an order of the Bullitt county court, Bullitt being the county of the decedent's residence at the time of his death. The estate left by the decedent consisted of a farm and such personal property as is customarily owned by a farmer of moderate means, the real and personal property all being situated in Bullitt county.

Shortly after the death of the decedent his real estate was divided between his widow and three sons, the widow

being assigned dower in the whole and each of the sons allotted a small tract of the land not included in the dower assigned. Whether the partition was had in an action brought for that purpose or by agreement of the parties does not appear from the record before us, but it is admitted that it was consummated by the due execution of proper deeds of conveyance between them.

On March 5, 1910, C. T. O'Bryan and wife, by a deed acknowledged March 7, and duly recorded March 8, 1910, conveyed the twenty-nine acres of land allotted to him in the division of his father's real estate to one Herman Morris, who thereafter executed a mortgage on the land to the Masonic Relief Fund of Kentucky and W. E. Johnson, its treasurer, to secure a loan of \$685.00, made him by the mortgagees at the time of the execution of the mortgage. The date of this mortgage seems to have been February 4, 1913, and it was recorded as of the same date. These dates appear in an obscure place in the record where they could not be expected to be discovered. Morris, the mortgagor, having failed to pay the mortgage debt at its maturity, suit was brought thereon in the Bullitt circuit court by the mortgagees, wherein judgment was duly rendered in their favor against the mortgagor for the amount of the mortgage debt, interest and cost; and also for the enforcement of the mortgage lien by a sale of the mortgage property or enough thereof to pay the debt, interest and cost; one J. F. Combs, master commissioner of the Bullitt circuit court, being directed to make the sale. Combs thereafter duly advertised the property for sale as directed by the judgment in question, but was prevented from selling it by a temporary injunction issued in the present action at the procurement of the appellants, James R. O'Bryan and wife.

The action of James R. O'Bryan and wife instituted January 29, 1914, in the Bullitt circuit court against J. E. O'Bryan, the appellee, Masonic Relief Fund of Kentucky, W. E. Johnson, its treasurer, J. F. Combs, master commissioner of the Bullitt circuit court, and Herman Morris. The petition sets up a claim of title to the twenty-nine acres of land in question in the appellants, James R. O'Bryan and wife, and alleges their possession of same, attacks the validity of the mortgage executed by Herman Morris to the Masonic Relief Fund and Johnson, treasurer; alleges the advertisement of the

sale of the land by Combs as commissioner under the judgment of the Bullitt circuit court enforcing the mortgage lien in favor of Masonic Relief Fund and Johnson, treasurer. The petition also set up the grounds necessary to obtain an injunction and prayed that appellant's title to the land be quieted, alleging in that connection that their title had been acquired through a deed from J. E. O'Bryan, who was called upon to assist them in defending and maintaining their title.

J. E. O'Bryan filed an answer to the petition admitting its averments and setting up the facts respecting appellant's title to the land, and his (J. E. O'Bryan's) former connection therewith, the facts alleged being, in substance, as follows: That among other assets belonging to the estate of James L. O'Bryan was a note of \$615.55, owing by the decedent's son, C. T. O'Bryan, upon which he was sued by the administratrix July 15, 1909, in the Jefferson circuit court, common pleas branch, first division, C. T. O'Bryan then being a resident of Jefferson county. That the administratrix obtained personal judgment on this note against C. T. O'Bryan early in May, 1911, and on May 24, 1911, caused execution to be issued thereon which immediately went into the hands of the sheriff of Bullitt county, to whom it was directed, and the same was by him shortly thereafter (date not given) duly levied upon the twenty-nine acres of land in question as the property of C. T. O'Bryan and also upon the latter's undivided interest in the land that had been assigned to his mother as dower. After due advertisement the lands upon which the execution was levied, were sold July 10, 1911, at which sale J. E. O'Bryan became the purchaser, and the lands having brought at the sale sums exceeding two-thirds of their appraised value, respectively, the sheriff in February, 1912, executed a deed conveying them to the purchaser, J. E. O'Bryan, the deed being recorded Feb. 17, 1912. On May 28, 1912, the same lands were sold by J. E. O'Bryan to the appellants, J. R. O'Bryan and wife, and on that day by deed conveyed them, which deed was put to record January 3, 1912. The deed from the sheriff to J. E. O'Bryan and that from the latter to J. R. O'Bryan and wife show the nature of the title claimed by them to the land in controversy. It was also alleged in the answer of J. E. O'Bryan that the deed of March 5, 1910, from C. T. O'Bryan to Herman Morris was executed with

the intent on the part of the grantor and grantee to defraud the former's creditors; that Herman Morris had brought the suit mentioned for the administratrix of James L. O'Bryan against C. T. O'Bryan and was acting as the attorney of the former in that action at the time of the execution of the deed to him from C. T. O'Bryan and that he then well knew the insolvency of C. T. O'Bryan and, by accepting from him the deed, attempted to aid him in preventing the collection of the note upon which his mother, the administratrix of James L. O'Bryan, had sued him and that such conduct upon the part of Morris was a fraud upon the administratrix as his client. Furthermore, that by reason of such fraud Morris obtained no title to the 29 acres of land in question; that the mortgage he gave to the Masonic Relief Fund and Johnson, its treasurer, was for that reason invalid, and that the latter, in accepting the mortgage, were not innocent purchasers or mortgagees in good faith.

The answer was made a cross-petition against the Masonic Relief Fund, Johnson, treasurer, Herman Morris and Combs, commissioner.

The Masonic Relief Fund, Johnson as treasurer, and Combs, Commissioner, by their joint and several answers to the petition of appellants and cross-petition of J. E. O'Bryan, substantially traversed the material averments of each of those pleadings and alleged ignorance on the part of the mortgagees of the alleged fraud in the deed of C. J. O'Bryan to Morris and their good faith in accepting the mortgage. Later other pleadings, responsive and by way of amendment, were filed by the parties, but they will not be discussed as it is believed what has been said of the original pleadings will serve to indicate the issues between the parties. On the submission of the case the court below rendered judgment dismissing the petition of the appellants and cross-petition of J. E. O'Brien, dissolving the injunction obtained by the former, and directing the commissioner to execute the judgment enforcing the mortgage lien in favor of Masonic Relief Fund and Johnson, treasurer, against Herman Morris.

In the former opinion we affirmed the judgment of the circuit court upon the assumption that the validity of the mortgage from Morris to the Masonic Relief Fund and

Johnson, its treasurer, had not been successfully impeached, and although it was executed after the judgment against C. T. O'Bryan in favor of the administratrix was obtained, and after the execution issued thereon was levied on the land covered by the mortgage, also after the alleged levy on the land of an attachment claimed to have been issued by the procurement of the administratrix in her action against C. T. O'Bryan, as there was no sale of the property at all under the attachment, and none under the execution until after the execution of the mortgage, and the administratrix had not preserved her lien under either writ by recording in the proper office such a notice as is required by Ky. Stats., section 2358a, subsection 2, the lien given by the mortgage should prevail against the execution sale to J. E. O'Bryan and the title asserted by appellants under their deed from J. E. O'Bryan and the deed to the latter from the sheriff.

We find, however, that we were misled by the confused state of the record as to the date of the execution of the mortgage from Morris to the Masonic Relief Fund and Johnson. Instead of its having been made August 2, 1911, as stated in the former opinion, the mortgage was executed February 4, 1913, and recorded the same day, which was not only after the levy on the land of the execution issued on the judgment of the administratrix against C. T. O'Bryan, but after its purchase by J. E. O'Bryan at the sale under the execution, and also after the execution of the deed by the sheriff conveying him the land. So it would seem that when the mortgage in question was made, J. E. O'Bryan was in possession of the land under a deed from the sheriff then of record, which would make the title of appellants, derived through the deed made them by J. E. O'Bryan, superior to the mortgage lien of the appellees, Masonic Relief Fund and Johnson, treasurer. This would not be true, however, if it should be determined that the deed from C. T. O'Bryan to Herman Morris is a valid instrument, which is a question the circuit court does not seem to have passed on and, in fact, could not have intelligently decided on the record before it. It should be kept in mind that the deed from C. T. O'Bryan to Morris was made March 5, 1910, and put to record March 8, 1910. The action of the administratrix against C. T. O'Bryan was then pending, but the judgment in her favor was not rendered until some time

in May, 1911, more than a year after the execution of the deed from C. T. O'Bryan to Herman Morris. If, therefore, this deed was valid when made, it was still valid when Morris executed the mortgage to the Masonic Relief Fund and Johnson, treasurer; therefore, the mortgage lien of the latter, in that event, would be superior to the title asserted by appellants under the execution sale, sheriff's deed and deed of J. E. O'Bryan.

There appears in the record no evidence assailing this deed, and in view of the charge of fraud in its execution contained in the answer and cross-petition of J. E. O'Bryan it was incumbent on him and the appellants to prove the charge. We have already intimated that the circuit court could not, upon the record before it, well have passed on the only vital question in this case, namely, the validity of the deed from C. T. O'Bryan to Herman Morris, both of whom are charged with the alleged fraud in the instrument and the latter of whom is charged with the alleged fraud in the mortgage to the Masonic Relief Fund and Johnson, when neither the vendor nor vendee had been brought before the court. In fact C. T. O'Bryan was not made a party to the action and Morris, though made a defendant, was never served with summons, or other process. The latter are necessary parties to the action and to be bound by the judgment determining any rights they have or may have had under the deed or mortgage it was necessary that they be brought before the court. In view of this situation and of the fact that there was no proof in support of the attack upon the deed or mortgage it seems to us that the case was prematurely tried.

We have not overlooked the vigorous assault made by the brief of appellants' counsel upon the answers of the appellees to the petition of appellants and cross-petition of J. E. O'Bryan, but we cannot agree with him that they are insufficient to form an issue of fact upon the questions of fraud alleged in the petition and cross-petition. The answers are awkwardly drafted and their meaning, in some respects, obscurely expressed, but our careful examination of them convinces us that, considered as a whole, they do, either by way of specific denials or affirmative pleas, sufficiently put in issue all the affirmative matter of the petition and cross-petition.

As the judgment must be reversed, upon the return of the case to the circuit court the parties should be per-

mitted, if they so desire, to take proof on the questions of fraud raised by the pleadings.

For the reasons indicated the petition for rehearing is granted; the former opinion is withdrawn; this opinion substituted for it, and the judgment reversed for such further proceedings in the court below as may be consistent with the present opinion.

Louisville & Nashville Railroad Company v. Cook.

(Decided February 7, 1919.)

Appeal from Jefferson Circuit Court
(Common Pleas Branch, Third Division).

Railroads—Death of Person On or Near Track—Negligence—Evidence—Sufficiency.—In an action against a railroad company for death of a pedestrian on a public street, evidence held insufficient to warrant a finding of negligence.

MOORMAN & WOODWARD, BENJAMIN D. WARFIELD and JAMES J. DONOHUE for appellant.

ELMER UNDERWOOD for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

In this action for personal injuries, plaintiff, Edward R. Cook, recovered of the defendant, Louisville & Nashville Railroad Company, a verdict and judgment for \$5,500.00. Defendant appeals.

The only question we deem it necessary to consider is whether the trial court should have sustained defendant's motion for a peremptory instruction.

The evidence is as follows: Plaintiff lived on Dumesnil street in the western part of the city of Louisville. On Saturday evening, November 4, 1917, plaintiff left his home and reached 18th and Dumesnil streets about 7:30 o'clock. There he caught a car for 18th and Market streets. He then went to a saloon at 15th and Market, where he was joined by Joe Thorp. After stopping at certain saloons and taking several drinks of beer, they went to a flat at 136 West Market. According to Thorp, it was then about 10:20 p. m. They were invited into the kitchen and Cook drank two bottles of beer.

Later on, they went into the parlor, where Cook drank some whiskey. In about thirty minutes, Cook became so intoxicated that he did not remember anything that subsequently occurred. Thorp says that they left the house about 12:20 a. m. After going downstairs, Thorp asked Cook to wait until he went back to say something to one of the women. Thorp was gone for only a minute or two and when he returned Cook had disappeared. At that time, Cook was drunk and staggering. Failing to find Cook, Thorp assumed that he had taken a car and gone home. About five o'clock the next morning, Cook was found by some railroad men on Fulton street, between Jackson and Preston streets. Fulton is a public street of the city and is paved with granite blocks from curb to curb. Defendant's track is on the north side of the street. Though there is no paved sidewalk on this side of the street, there is a beaten path lying between the curbstone and the defendant's track. There were weeds along this pathway, and also along the defendant's track. Only two engines are shown to have passed over this track on the night of the accident. Engine No. 341 passed by itself about 11:05 p. m., *en route* to the Barrett Manufacturing Company, and returned about 11:15 p. m. with two cars attached. Engine No. 2023, with seven cars attached, passed some time between 2 a. m. and 2:30 a. m., and returned with several cars some time between 4:30 a. m. and 5 a. m. On their return the crew heard some one call. The engine was stopped and they discovered Cook lying between the track and the north fence, with both legs badly mashed and some cuts on his head. Cook was then taken to the city hospital where his legs were amputated. On the first trip made by engine No. 2023, the headlight was burning and the speed of the engine was from four to six miles an hour. There was some evidence that the bell was not ringing, and very slight evidence that a proper lookout was not kept. Plaintiff was not seen by anybody after he left Thorp at 136 West Market. He did not remember how he got to the place of the alleged accident, or where he was, or under what circumstances he was struck. Prior to the time he was found, he regained consciousness several times but only for a short period. The last time he became conscious he threw out his arm and struck one of the cars attached to engine No. 2023. The car was standing still.

He then called for help and was discovered by the train crew. A physician testified that his legs had been run over by a train, and that if he was unconscious he could not have attempted to board the train. There was further evidence that there was a circular wound behind plaintiff's ear, and that beneath the tender of the engine there was a brake rigging or iron bar, the end of which corresponded in size and shape to the wound. There was no proof, however, that any blood was found on this iron bar or any other part of the engine. On the contrary, there was evidence that the engine was examined and no blood was found thereon. Defendant also showed that a proper lookout was kept and that the bell on the engine was being rung.

It may be conceded that, as the place of the accident was in a public street, defendant was charged with the duty of giving reasonable warning of the engine's approach and of keeping a proper lookout. And, though we further concede that there was sufficient evidence to make defendant's failure of duty in these respects a question for the jury, this would not be sufficient to make out a case unless the plaintiff further showed that such negligence, if any, was the proximate cause of his injury. To meet this requirement, plaintiff offers the theory that he was lying unconscious on the track, and therefore in a position to have been seen if a proper lookout had been kept. It is argued that this theory finds support in the fact that plaintiff was unconscious and could not have been injured in an attempt to board the train or to pass between the cars, and the fact that the brake rigging corresponded in size and shape to the wound on plaintiff's head was an additional circumstance showing that he was run over by the engine. The argument that plaintiff was not in condition to attempt to board or pass between the cars loses its force when it is remembered that he had sufficient power of locomotion to go for a distance of a half mile before the place of accident was reached, and the mere fact that the brake rigging corresponded in size and shape to the wound on plaintiff's head, without further proof that such rigging bore external evidence of having come in contact with someone, carries with it no probative force whatever. It merely shows a bare possibility that plaintiff was run over by the engine, without carrying with it that quality of proof

sufficient to induce conviction. Doubtless, if the wheels and other portions of the machinery and rigging under the cars had been examined with the same care, and with the same end in view, other rigging or machinery would have been found which might have produced the injury. In cases like this, a recovery cannot be had on mere surmises, or speculation as to how the injury might have happened. If the injury may as reasonably be attributed to a cause that will excuse the defendant, as to a cause that will subject it to liability, then the plaintiff cannot recover. For aught that appears, plaintiff may have been riding on the train, or he may have attempted to board the train or pass between the cars, and have thus been injured. The proven facts are as consistent with this theory as with the theory that he was on the track when the engine approached. Under these circumstances, there was nothing to submit to the jury and the trial court erred in refusing the peremptory asked by the defendant. *Stuart's Admr. v. Nashville C. & St. L. Railway Co.*, 146 Ky. 127, 142 S. W. 232.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

Hardy Buggy Company v. Paducah Banking Company.

(Decided February 25, 1919.)

Appeal from McCracken Circuit Court.

1. **Bills and Notes—Endorsers—Liability.**—If, after the indorser of commercial paper has paid the debt, a recovery is had by the creditor from the principal, the indorser is entitled to recover from the creditor the amount obtained from the principal. So also if collateral notes given by a surety or indorser have been converted into money which amounts to a greater sum than the debt, the indorser or surety may recover of the holder the balance over and above the amount necessary to extinguish the debt.
2. **Bills and Notes—Endorsers—Liability.**—An indorser of commercial paper is relieved from liability thereon by discharge in bankruptcy.
3. **Bills and Notes—Endorsers—Liability.**—Where a payee in commercial paper, who indorses several different notes to a bank on different occasions, afterwards becomes bankrupt, and by a composition agreement with its creditors pays the bank 20% upon the notes and is discharged in bankruptcy, but at the same time

enters into a written agreement with the bank that in case the bank collects the notes in full it shall retain enough of said money, plus the 20% paid in the composition, to satisfy the full indebtedness of the indorser to the bank before it shall become liable to the indorser for any excess payment, the indorser is estopped to claim a recoupment of the bank upon a note which is over paid when other notes are unpaid.

BRADSHAW & McDONALD for appellant.

WHEELER & HUGHES for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

The Hardy Buggy Company, a domestic corporation, was engaged in manufacturing vehicles in Paducah in 1914 and 1915. In selling its products it received, in many instances, negotiable paper from its customers, which it in turn indorsed and discounted with the Paducah Banking Company. All the notes were not discounted at one time, but only as the buggy company required funds to meet its payroll or other emergencies, and the notes were sold and delivered to the bank from time to time over a period of many months. In March, 1915, the buggy company went into bankruptcy.

Shortly thereafter it entered into a composition with its creditors upon a twenty per cent basis, and on July 6th, 1915, the twenty per cent was duly distributed to all the creditors, including the Paducah Banking Company, to which the buggy company was liable upon its indorsement, and upon one or more individual notes for approximately \$5,000.00. At the time of the making of the composition and the payment of the twenty per cent to the banking company it was agreed between the bank and the buggy company that in the event the bank should succeed in collecting the full face of the several notes which it had purchased from the buggy company, and which the buggy company had indorsed to it, or any amount greater than the total sum for which the buggy company was liable to the bank, the excess over and above said amount, the twenty per cent included, was to be returned to the buggy company by the bank. Shortly after the composition, and in due course, the buggy company was discharged in bankruptcy and, therefore, relieved of liability to the bank upon its indorsements of the several notes which it had discounted at that insti-

tution. From time to time the bank collected in full some of the notes discounted to it by the buggy company and payments upon other notes, until finally the amount collected by the bank, added to the twenty per cent which the buggy company had paid it, exceeded the total liability of the buggy company to the bank, after paying all cost and expenses which the bank had undergone, and left a surplus to the credit of the buggy company. Thereupon the buggy company instituted this action against the bank to recover \$834.57, which it alleged was the total of the excess collected by the bank over the indebtedness of the buggy company to it.

By its answer the bank admitted that it had collected enough money on the several notes indorsed to it by the buggy company, plus the twenty per cent paid by the trustee in bankruptcy, to extinguish the total liability of the buggy company to it, and leave a balance of \$76.04 to the credit of the buggy company after the payment of all cost and other expenses, and tendered said amount to the buggy company. The buggy company, however, refused to accept the \$76.04 in satisfaction of its claim, but insisted that it was in the same position as any other indorser who pays part of a note and the holder subsequently collects the full amount of the note from the maker, and therefore the holder must refund to the indorser (the buggy company) the amount paid by the indorser. It is the further contention of the buggy company that the several notes discounted at the bank were separate and distinct transactions and independent contracts to be adjusted independently of each other, and that when the bank collected the note of "A" in full, indorsed to it on March 1, 1915, the buggy company was entitled to a refund of twenty per cent paid by it in the composition, because the bank had received upon that particular transaction 120%, whereas it was entitled to receive only 100%, and this notwithstanding the note of "B," discounted on March 5, 1915, had not been paid by the maker and the bank had only received the twenty per cent. In support of this contention the buggy company argues that it was not liable to the bank upon any indorsement because of its discharge in bankruptcy and, therefore, since it was not liable on the indorsement of the note of "B," which was not paid, the bank had no right to take the surplus amount paid on the note of "A" and apply it to the extinguishment of the

note of "B," whereon the buggy company was originally liable as an indorser but which liability had been extinguished by the discharge in bankruptcy.

On the other hand the bank contends that the discounting of the several notes by the buggy company must be treated as a single contract or transaction in the adjustment of these matters, because it proved its claim against the bankrupt buggy company as one sum, \$5,125.55, and that in making the composition it entered into a specific agreement with the buggy company whereby it was to have and receive the full amount of its indebtedness from the several notes discounted to it, and the twenty per cent, before it was to be liable to the buggy company for any excess, and that the agreement was not with respect to each separate note but as to the whole number and amount due. As a rule generally recognized, if after the surety has paid the debt, a recovery is had by the creditor from the principal, the surety is entitled to recover from the creditor the amount obtained from the principal, but the creditor is not entitled to an overpayment either by the sureties or by the principal and sureties. If security, given by a surety, having been converted into money, brings more than the amount for which the surety is liable, he can recover the excess. 32 Cyc., p. 236.

"Where the creditor, after payment by one surety of the amount for which the sureties were liable, recovered a dividend from the insolvent principal on the whole amount originally due from the principal, the surety who made the payment is entitled to recover a share of such dividend bearing the same proportion to the whole dividend as the sum paid by the surety bore to the sum proved for by the creditor." *Gray v. Seckham*, L. R. 7, Ch. 680.

While the buggy company is absolved from liability to the bank upon its indorsement of each of the notes by reason of its discharge in bankruptcy, nevertheless it had no interest or property in the notes which it sold and transferred to the bank and was not entitled to recover from the bank any part of the sum which the bank collected from the makers of the several notes. Its right, if it had any, was to recoup the amount it paid upon the several notes which brought the total amount paid upon such notes above the amount due the bank, if it did so

do. But when it entered into the agreement with the bank whereby the bank was to be fully reimbursed on account of the buggy company's entire liability to it before the bank was to pay the buggy company the excess, it was bound by its agreement and is not entitled to be recouped until the bank has been fully indemnified. As to the terms of the contract and agreement between the bank and the buggy company, the evidence is conflicting, but the chancellor found the facts against appellant, and there is sufficient evidence to justify the conclusion reached. But for this agreement the buggy company would be entitled to recover of the banking company the excess which the bank has collected upon the several notes without relation to the deficit on other notes up to the amount of twenty per cent paid by the buggy company. The chancellor having found the terms of the agreement as contended by appellee bank, and there being sufficient evidence and consideration to support it, we perceive no error in the ruling of the court, and the judgment is affirmed.

Morris, et al. v. Daniel.

(Decided March 4, 1919.)

Appeal from Campbell Circuit Court.

1. **Easements—Prescription.**—It is incumbent upon one claiming an easement or roadway over the lands of another, to establish his right thereto, by grant or prescription.
2. **Easements—Commissioner's Report—Failure to Confirm.**—In a suit for partition of lands the commissioner appointed to divide the property, made a report in writing dividing the lands into four parts, and designating by metes and bounds a passway from lot No. 4, over and across lots Nos. 1 and 2 to the public highway. This report was filed with the clerk and placed with the other papers in the partition suit, but the report was never recorded, and the judgment in the case did not mention the roadway recommended in the report, nor did the deeds made by the commissioner to the allottees provide for such roadway. Held, that such unrecorded report of commissioner did not vest in the owner of lot No. 4 an easement over lots Nos. 1 and 2.
3. **Easements—Commissioner's Report.**—A commissioner's report has no force or effect upon the subsequent proceeding where the judgment does not refer to it or the deeds follow the recommendations contained in the report.

WESLEY M. RARDIN for appellants.

OTTO WOLFF and V. O. WILLIAMS for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

Edward Morin died in 1878 or 1879, the owner of 370 $\frac{1}{4}$ acres of land on the Flag Spring and Alexandria turnpike, in Campbell county. He left surviving him three children and seven grandchildren by a fourth child. Shortly after his death a suit was instituted in the Campbell circuit court for a division of the lands into four parts, in kind, among the three children and grandchildren, and the master commissioner was appointed who made a report in writing accompanied by a plat, to the court subdividing the 370 $\frac{1}{4}$ acres into four tracts. In making this division. lots Nos. 1 and 2 fronted on the turnpike, and lot No. 4 was directly behind lots Nos. 1 and 2, and 203 poles away from the pike.

The report of the commissioner, after describing tract No. 4, adds this: "The whole lot No. 4, being 157 acres and 11 poles. There is to be a road used as an outlet from lot No. 4, as represented on the plat, along the division line between lots Nos. 1 and 2, whose bearing is N. 69 $\frac{1}{2}$ E.; said road is to be 20 feet in width, beginning at a stone in the northeast line of lot 4, second corner to lot No. 1, and fourth corner to lot No. 2; thence running with said division line a distance of 203 poles to the Flag Spring and Alexandria turnpike, 10 feet being granted on each side of the division line.

"All of which is respectfully reported."

This report appears to have been duly lodged by the commissioner with the papers of the case, and filed by the clerk and made a part of the record in the case, and confirmed by the court, but never recorded in the manner provided by law. No copy of the judgment in the partition suit, or deeds made by the commissioner to the heirs, is made part of this record. So far as this record shows the judgment did not follow the report of the commissioner with respect to the roadway contained in the report copied above nor did either of the deeds made by commissioner contain any reference to said road or passway.

Immediately after the division was made, the parties to whom the tracts were allotted took actual possession and enclosed the tracts by fencing and placed other improvements on the land. There was no roadway or traveled way along the line described in the report at the time the report was made, the judgment entered and

deeds executed by the commissioner, and there has never been a travelway along the line designated for the road from the time of the making of the report to the present day, but there was a travelway which zigzagged over lot No. 1 from the line of lot No. 4 to the pike, and which was some two hundred feet or more away from the road designated in the report. The owners of lots Nos. 1 and 2 built various cross-fences through their lands which obstructed the proposed roadway at different points, and a fence was built from lot No. 4 at the point where lots Nos. 1 and 2 joined along the divide between lot No. 1 and No. 2, 203 poles to the pike, thus dividing in the middle the proposed 20 foot right of way from end to end, and that fence stood there for a number of years without objection or complaint from the owners of lot No. 4. Lot No. 4 was given to a daughter, Margaret Morin; lot No. 1 to the heirs of Mariah Briggs, a deceased daughter of Morin, and lot No. 2 to another daughter, Cynthia Morin, in the original division between the heirs of Edward Morin, but each of these persons has sold and conveyed the lands, and appellants, E. J. Morris and Sammie Morris are the owners of tract No. 1, and John R. Nelson and Rob. Daniel own lot No. 2, while G. S. Daniel owns lot No. 4, having acquired title to it in 1910. This action was instituted by Daniels against Morris and his wife, praying a mandatory injunction, commanding the defendants to open the roadway along the line between lots Nos. 1 and 2 from lot No. 4, to the turnpike, by removing all obstructions thereon, such as fencing, and praying that they and their privies in estate be perpetually enjoined from thereafter obstructing or interfering with appellee's use thereof. It is admitted that the roadway, which appellee now seeks to open, was not provided for in the judgment of division which allotted the lands of Edward Morin, and that the deeds made by the commissioner under said judgment did not refer to said passway from lot No. 4 to the pike; and further that none of the mesne conveyances from Mariah Briggs and Cynthia Morin to the present owners contain any reference whatever to said right of way as designated in the commissioner's report.

It would, therefore, appear that appellee Daniel rests his claim of right to the roadway solely and alone upon the provisions and description set forth by the commissioner who divided the land in his report to the Camp-

bell circuit court, and such report, in so far as it affects the roadway, is copied above. The question is: Can a description and recommendation in a report of a commissioner in a suit for partition of land, which is not recorded, become such a part of the proceedings in the partition suit and link in the chain of title of which all subsequent grantees must take notice?

It is well settled that where a right to a roadway is vested by grant or judgment, in partition proceedings, all subsequent purchasers who hold under the grant or judgment, are bound by the road reservation, and the servient estate can not avoid the burden by pleading and proof of non-user of the easement acquired by the grant, or in any manner, except by adverse holding for the statutory period. In the case of *Johnson v. Clark, et al.*, 57 S. W. (Ky.) 474, this court held that non-user of a passway acquired by grant does not destroy the easement in the absence of any act on the part of the owner of the servient estate which is inconsistent with the existence of the easement; and the acquiescence by the owner of the easement in temporary changes in the passway from one route to another for the convenience of the owner of the servient estate, does not operate as an abandonment of the original way granted. See also *Dodson v. Meritt*, 141 Ky. 155; *Speers v. Weddington*, 146 Ky. 434; *N. P. B. & S. Co. v. Plummer*, 149 Ky. 534; *List v. Jacoby*, 22 R. 757; *Boyd v. Morris*, 32 R. 645.

It, therefore, appears that nothing less than an adverse and hostile use of the servient estate, wholly inconsistent with the right of the owner of the easement, will start the statute of limitation running, which, when the period has elapsed will extinguish the right. Certainly nothing short of the continued adverse use for the statutory period will establish a right by prescription in the adverse claimant.

Appellants and those under and through whom they claim have owned, held and claimed the land over which the roadway is proposed, adversely, continuously and uninterruptedly for many years and much more than fifteen years next before the commencement of this action. Had the roadway been once actually established along the route in question, appellees and their predecessors would not have lost their right therein by mere non-user, but since no roadway was actually estab-

lished and no grant made thereof, the open, actual, adverse holding of appellants and their predecessors in title is conclusive of the question involved. The fences placed across the proposed roadway as well as the one built from end to end dividing it in two parts amount to a public declaration of disseizin and bars any right which appellees and their predecessors had, if any, at the end of fifteen years from the erection thereof.

But did Margaret Morin, to whom was allotted lot No. 4, in the division of her father's estate, acquire an easement in the roadway in controversy in this action by the mere filing of the commissioner's report of partition, which designated and described the passway? We think not. If the report had been confirmed by the court and recorded in the proper office, no doubt it would have become a link in the chain of title which would have impressed itself upon the muniments thereof, in such way as to have given notice to all subsequent holders of the servient estate that the right to the road existed and was an encumbrance thereon, which right could not have been defeated except by an adverse user or holding for the statutory period. But so far as this record shows the court did not confirm and cause to be recorded the report of the commissioner. It would appear that the court rejected the report in so far as it designated a road from lot No. 4, over lots Nos. 1 and 2 to the pike, because the judgment so far as this record shows did not describe the passway, refer to it or even mention a passway.

Neither did the deeds made by the commissioner of the court, pursuant to the judgment mentioned, describe or give to the grantee of lot No. 4 any right of way or easement in a roadway over lots Nos. 1 and 2. Hence, we conclude that the court rejected at least so much of the report of the commissioner as recommended a passway from lot No. 4, over lots Nos. 1 and 2 to the pike, because if the judgment had adopted the report it would have followed the same in the establishment of the road, and some mention would have been made thereof in the judgment, and the deeds of the commissioner, following the judgment, would also have mentioned and described the right of way. A report of commissioners filed in a suit is only the recommendation or suggestion of the commissioner which the court may or may not accept and confirm. Often the report is wholly rejected or disregarded; sometimes only partly adopted. This report

may have been adopted in all respects except that recommending the road, but since the road is the only thing in controversy in this action, it is not important to inquire what else may have been disregarded or rejected by the judgment. If lot No. 4 did not acquire the roadway in and by the partition proceedings in the Campbell circuit court, as appears to be true, no such right exists or ever existed.

We therefore conclude that the trial court erred to the prejudice of appellants in sustaining the prayer of the petition, granting the mandatory injunction against the present owners of lot No. 1 requiring them to remove the obstructions from the alleged passway, and perpetually enjoining them from obstructing the same in the future. Upon the record, the judgment should have been for appellants, and the petition dismissed.

Judgment reversed for proceedings consistent with this opinion.

Best, as Receiver, et al. v. Melcon, et al.

(Decided March 7, 1919.)

Appeal from Laurel Circuit Court.

1. **Fraudulent Conveyances—Husband and Wife.**—A wife having been deeded certain property by her husband at a time when he was solvent, the property being hers, she is privileged to thereafter dispose of it as she might deem fit, and a conveyance by her of said property, or a portion thereof, to a creditor of her husband is not a preferential conveyance under section 1910 of the Ky. Stats., nor can other creditors of the husband complain.
2. **Trusts—Parol Testimony.**—The objects and purposes of a latent trust or an express parol trust can be given or shown by parol testimony.

HAZELWOOD & JOHNSON for appellant Best, Receiver.

H. C. CLAY for John R. Boreing.

METCALFE & JEFFRIES and A. T. SILER for appellees A. H. Melcon, et al.

SAM C. HARDIN for W. B. and Elizabeth H. Catching.

OPINION OF THE COURT BY JUDGE QUIN—Affirming in part and reversing in part.

Prior to 1903 W. B. Catching was interested in certain mail contracts, having been engaged in this business for a number of years. The mail carrying service of the United States at one time was divided into four sections

and each year bids were opened for the carrying of the mail in these several sections, the successful bidder being required to give bond for the faithful performance of his duties. W. B. Catching and Vincent Boreing had been the successful bidders under these lettings for a number of years, and each made a large sum of money until the manner of letting was changed and contracts given to local people.

W. B. Catching was interested in the First National Bank of London, Kentucky, as a stockholder, director and later as president.

Between his marriage in 1881 and 1907 he lived for ten or twelve years in Washington, D. C. This was because of his work on the mail contracts, although he always retained a home in London.

On June 1, 1903, he conveyed his London property, consisting of seven pieces of land and improvements thereon, to his wife, Elizabeth H. Catching, the consideration being that his wife would assume and liquidate his entire indebtedness at that time, the amount thereof being stated in the deed. This deed was delivered to Vincent Boreing, and was never recorded. Some correspondence passed between Mrs. Catching and Mr. Boreing relative to this deed, from which it seems that Mr. Boreing told Mrs. Catching that he was holding the deed subject to her instructions, and that if she instructed him to record it he would do so, but it appears that W. B. Catching did not want the deed recorded. In a letter to Vincent Boreing, dated July 1, 1903, he said: "You must not think of filing that deed. After mature deliberation that would ruin me. I can't think of it. Not only ruin me but follow my children. I would rather die without a cent."

It is claimed by the appellant that W. B. Catching was drinking heavily at the time of the execution of this deed, and fearful that he would lose all of his property his wife and Mr. Boreing prevailed upon him to make this deed, which he did. On the other hand there is proof to the effect there was some marital trouble in the Catching family, and this was the reason for the execution of the deed.

Vincent Boreing died September 16, 1903. John R. Boreing, a son of the decedent, and administrator of his estate, in looking over his father's papers discovered this deed and it was sent to Mr. and Mrs. Catching. January 10, 1905, a new deed was executed by Mr. Catching

in which he conveyed to his wife the same property embraced in the earlier deed, but the amount of the indebtedness was not stated in the later deed, it being explained that some of the indebtedness existing in 1903 had been paid. This deed was acknowledged August 4, 1905, and recorded in the Laurel county clerk's office the next day.

Besides the property owned by W. B. Catching in London, Ky., he owned a residence in Washington, D. C., and this he conveyed to his wife about the same time that he conveyed the London property.

Notwithstanding the deed of 1905, the property continued to be assessed in the name of W. B. Catching and he seems to have had something to do with the management thereof, although the insurance on the property was carried in the name of the wife. The taxes were paid through the First National Bank, and it is not clear whether they were charged to Mr. Catching or his wife; she testified that she paid the premiums on the policies. Part of the property was destroyed by fire in November, 1910, and the proceeds of the policies were paid to Mrs. Catching.

Between 1905 and 1914 W. B. Catching became heavily involved in debt, a great deal of this apparently being due to the rebuilding of the property destroyed by fire, and being a portion of the property embraced in the deed of January 10, 1905, and as a result of this indebtedness several suits were filed in the Laurel circuit court, and the present appeal is in the consolidated suits filed against W. B. Catching, et al.

The doors of the First National Bank of London were closed on April 19, 1911, at the instance of the Comptroller of Currency of the United States, and Fred W. Weitzel was placed in charge as receiver.

About 1905 W. B. Catching owned 65 shares of stock in the First National Bank of London, the market value of which was about \$200.00 a share, and by 1911 he and his wife had increased their holdings so that they owned 91 shares of the stock.

March 16, 1914, Mrs. Catching, her husband joining her, conveyed to Sam C. Hardin, her cousin and an attorney in London, as trustee, four parcels of land; thereafter on March 26, 1914, Sam C. Hardin, trustee, conveyed said property to W. B. Catching. A portion of the land included in the deeds above referred to was conveyed to R. M. Catching, a son, for a consideration of

approximately \$2,000.00. On April 27, 1914, W. B. Catching and his wife conveyed to S. A. Lovelace the remainder of the property embraced in the deeds above referred to for a consideration of \$6,500.00, the consideration being evidenced by two notes of \$2,000.00 each, and one of \$2,500.00, payable in six, nine and twelve months, respectively, after date, and to secure the payment thereof a lien was retained on said property. Around this deed centers most of the controversy of these suits. W. B. Catching had endeavored to dispose of this property before the conveyance to Lovelace, and after the conveyance he endeavored to dispose of the notes, and finally assigned and transferred them to the receiver of the bank. Failing to pay the first two notes S. A. Lovelace, in an endeavor to be relieved of liability on account of said notes, conveyed the property to the receiver, but he was told by the receiver that the latter could not release him from his liability thereon without the consent of the Comptroller of Currency.

December 26, 1908, Elizabeth H. Catching, for a consideration of \$18,000.00, conveyed to the First National Bank a portion of the property received under the deed of 1905. December 3, 1913, she conveyed another lot to said bank in consideration of \$1.00 and other valuable consideration.

In an endeavor to help the bank, then in an insolvent condition, Mrs. Catching on April 1, 1914, borrowed from R. R. Hardin, a nephew, the sum of \$10,000.00, and executed a mortgage on her property to secure the payment thereof. On April 17, 1914, she borrowed the further sum of \$5,000.00 from said nephew, secured by mortgage on her property, the purpose being to use this as a credit on the indebtedness of Mrs. Catching and her husband at the bank, and a part of it was so applied. On the 24th day of April, 1914, for the same purpose, Mrs. Catching borrowed from Lena Bentler \$1,080.00, executing to said Lena Bentler a mortgage to secure the payment thereof.

August 20, 1914, John R. Boreing filed this suit against W. B. Catching and his wife, Elizabeth H. Catching, S. A. Lovelace, Lena Bentler, R. R. Hardin and the Bank of Williamsburg, alleging that he had become surety on a note of W. B. Catching, in the First National Bank of Corbin, in the sum of \$3,000.00; said note was not paid at maturity and the bank brought suit against said Boreing and Catching. Judgment was entered and

execution levied on certain property alleged to belong to W. B. Catching, as well as on property of said Boreing. The property of the said Boreing was advertised for sale and same was sold to satisfy said execution. Boreing paid the amount of said judgment and execution, including the cost of sale, amounting to \$3,160.84, and took an assignment from the First National Bank of Corbin of all its rights under said judgment and execution. Boreing thereafter caused an execution to be issued and sought to have it levied on the property of W. B. Catching. It was returned by the sheriff of Laurel county with the endorsement, "Within execution returned. No property found to satisfy this execution or any part thereof."

Boreing alleged that the deed of 1905 from W. B. Catching to his wife was for the purpose of defrauding the creditors of W. B. Catching; that W. B. Catching since said conveyance had put vast improvements on the property, and set up the mortgages to R. R. Hardin, Lena Beutler and the mortgage to the Bank of Williamsburg, to secure a note for \$1,500.00; also alleged that the conveyance by the Catchings to Lovelace was without consideration, and for the purpose of defrauding the creditors, and asked that the conveyance of 1905 be canceled, as likewise the deed to Lovelace; and asked for a general order of attachment, and that he be given a superior lien on the property or any proceeds thereof.

December 26, 1914, the Southern National Bank of Louisville brought suit against the same defendants, on a note for \$3,000.00, executed by W. B. Catching, March 5, 1914, pledging as collateral security 30 shares of the capital stock of the First National Bank of London, and asking for practically the same relief as the plaintiff in the preceding action.

The Cosmos Portland Cement Company also brought suit against W. B. Catching for a balance of \$155.55 due for cement furnished said Catching.

January 9, 1915, the Bank of Williamsburg brought suit on a note for \$1,000.00, executed by W. B. Catching, dated August 7, 1914. June 25, 1915, A. H. Melcon filed suit seeking judgment for \$650.00 on account of a due bill executed October 10, 1901, to Vincent Boreing, which Melcon had purchased for the sum of 10c from the estate of Vincent Boreing.

These five actions were consolidated and heard together, and proof taken in the consolidated actions. A

vast amount of proof was taken and the case submitted before the Hon. Sidney Gaines, as special judge, and on March 24, 1917, he entered a judgment in thirteen paragraphs, those involved in this appeal being as follows:

"1. That the petition of the plaintiff herein as against the defendant, Elizabeth H. Catching in so far as they seek to cancel or set aside the deed dated January 10, 1905, and executed by W. B. Catching to said Elizabeth H. Catching on August 4, 1905, which deed is recorded in the county court clerk's office of Laurel county, Kentucky, in deed book No. 27, at page 134, be and they are hereby dismissed and defendant, Elizabeth H. Catching, is adjudged to recover of the five plaintiffs herein her cost herein expended.

"2. That the attachment lien of the plaintiff, John R. Boreing, and the vendor's lien claimed by John A. Best, the present receiver of the First National Bank of London, Kentucky, against the real property conveyed by W. B. Catching and wife to S. A. Lovelace on April 27, 1914, the deed for which is recorded in deed book 45, at page 517, records of Laurel county clerk's office, be and the same are disallowed and refused, to which said John R. Boreing and John A. Best, as receiver, except.

"4. That the plaintiff, John R. Boreing, as assignee of the First National Bank of Corbin, Kentucky, is the owner of and entitled to collect from the defendant, W. B. Catching, a judgment heretofore rendered in this court in favor of said bank and against said E. B. Catching, amounting to the sum of \$3,160.84, with interest thereon from July 14, 1914, until paid, subject, however, to a credit of \$40.00 paid August 7, 1914.

"It is further adjudged that said John R. Boreing is not entitled to any of the relief sought in his petition, and said petition is now dismissed and the defendants therein, W. B. Catching and Elizabeth H. Catching, S. A. Lovelace, Lena Beutler and R. R. Hardin and John A. Best, as receiver of the First National Bank of London, Kentucky, are adjudged to recover of said John R. Boreing their costs expended in suit which is No. 2293.

"9. That the defendant, John A. Best, as receiver of the First National Bank of London, Kentucky, have and recover of the defendant, W. B. Catching, the following sums, to-wit: \$100.00 with interest thereon at the rate of six per cent per annum from the 24th day of September, 1913, until paid; the further sum of \$1,200.00, with

interest thereon at the rate of six per cent per annum from Feb. 28th, until paid; also the further sum of \$3,000.00 with interest thereon at the rate of six per cent per annum from the 8th day of March, 1914, until paid; also the further sum of \$550.00 with interest thereon at the rate of six per cent from the 4th day of May, 1914, until paid; also the further sum of \$2,250.00 with interest thereon at the rate of six per cent per annum from the 28th day of February, 1914, until paid; also the sum of \$900.00 with interest thereon at the rate of six per cent per annum from the 4th day of March, 1914, until paid, and his costs herein expended on said cross-petitions. And said cross-petition of the defendant, Fred W. Weitzel, is dismissed as to the defendant, W. B. Catching, without prejudice as to all other claims mentioned therein.

"11. That the execution of the deed from W. B. Catching and wife to S. A. Lovelace on April 27th, 1914, for the following described real property, and the assignment by said S. A. Lovelace to Fred W. Weitzel, then receiver of the First National Bank of London, Kentucky, and the execution of the deed on Feb. 2, 1915, from S. A. Lovelace and wife to Fred W. Weitzel, receiver of said real property, operated as an assignment and transfer of all the property and effects of the defendant, W. B. Catching, for the benefit of all his creditors pro rata under and pursuant to the provisions of section 1910 of the Kentucky Statutes. Said real property so embraced and conveyed by said two deeds is lying in the town of London, Laurel county, Kentucky, and described as follows: (here follows description of property).

"And that the proceeds of the two above described tracts of real property when sold shall be applied first to the payment of plaintiff's cost herein and then to the payment of the foregoing judgments against W. B. Catching and such other valid claims against him as hereafter be filed herein properly proven and allowed by the court—no further proof of the judgments herein rendered against W. B. Catching being required. It is further adjudged that the plaintiffs, Southern National Bank of Louisville, Bank of Williamsburg, Kentucky, and A. H. Melcon, recover of John A. Best, receiver of the First National Bank of London, Kentucky, their cost in this behalf expended upon this branch of these causes. To all of this 11th paragraph of this judgment the defendant,

John A. Best, the present receiver of the First National Bank of London, excepts and prays an appeal to the Court of Appeals, which is granted."

John A. Best, receiver, has prayed an appeal from paragraphs two and eleven of the judgment; appellees, A. H. Melcon, Southern National Bank of Louisville, and Bank of Williamsburg, have been granted an appeal by the clerk of this court from paragraph one of the judgment; John R. Boreing was not a party to these appeals, but he has filed a supplemental record and has made a motion for an appeal from paragraphs one, two, four and nine of the judgment, together with a statement of appeal, and this motion was passed to the hearing on the merits.

The deed of 1905. A reversal of paragraph one of the judgment which sustained the deed of 1905 is sought by appellees on the ground that it was an attempt to defraud the creditors of W. B. Catching, it being claimed that he was heavily involved in debt at the time, not only on notes and other obligations but by reason of certain liabilities on the mail contracts. There is some evidence to support this theory of the case, but we think the weight of the evidence sustains the decision of the chancellor as to this paragraph, because at time of this conveyance of the Laurel county property W. B. Catching had 65 shares in the First National Bank of London, which were worth approximately \$200.00 a share, besides a residence in Washington, valued at from seven to eight thousand dollars, subject to a mortgage of approximately \$3,000.00. According to the evidence of his wife and others, Mr. Catching was never compelled to pay anything on account of bonds executed in connection with his mail contracts. None of the debts sued on were contracted prior to the execution of this deed, with the exception of the Melcon due bill, and according to the testimony this was in reality an indebtedness of the Union Contracting Company, which was one of the companies organized to care for some of the mail contracts, and is fully explained by Mrs. Catching.

Without going into further details as to the testimony relative to the deed of 1905, we think it sufficient to say that the evidence sustains the chancellor, and we see no cause or reason to set it aside.

The Lovelace deed. The court reached the conclusion that this deed operated as an assignment for the benefit

of the creditors of W. B. Catching under section 1910 of the Kentucky Statutes. With this ruling we can not agree. Under the deed of 1905, the ownership in the property embraced within said deed passed to the grantee, Mrs. Elizabeth H. Catching, and became her absolute property, and she was privileged to do with it as she might see fit. She testifies that it was their endeavor to do what they could to decrease their indebtedness at the bank, as shown by the money she borrowed from her nephew, R. R. Hardin, and from Lena Beutler, and the payments of the indebtedness referred to in the deed of 1903, wherein she assumed the indebtedness of her husband, the assumption of which it appears from the record was accepted by the then existing creditors.

She testifies that she deeded this property to Sam C. Hardin in order for him to convey it to W. B. Catching, the money to be applied on the indebtedness of W. B. Catching at the First National Bank of London; that is, he was to sell the property and raise money on it to be paid to the First National Bank to be applied on his then existing indebtedness. Carrying out the instructions of Mrs. Catching, and in obedience to what she claims the purpose of the deed to Hardin, the proceeds of the lot sold to Mrs. Catching's son were turned over to the bank, and the three notes executed by Lovelace for the remainder of the property included in the Hardin deed were assigned and transferred to the bank's receiver. That Mrs. Catching had the right to direct just how the proceeds of this property should be applied goes without saying. She was the lawful owner, and since it was her purpose in conveying the property to the trustee to have the property used for the purpose of liquidating an indebtedness, not of Mrs. Catching but of her husband, we fail to see what right the creditors of W. B. Catching would have to object. The purpose of the trust was not disclosed in the deed, but the conveyance is to Sam C. Hardin, trustee, hence we have what might be termed an express parol trust, or as has been expressed in some cases a latent trust. Resulting trusts have been abolished in this state, Ky. Stats., sec. 2353; nor has the 7th section of the English Statute of Frauds ever been adopted here.

The original statute provided "that all declarations or creations of trust or confidences in any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law to

declare such trust, or by his last will in writing, or else they shall be entirely void, and of non-effect."

It is competent under the laws of this state to introduce parol evidence to show the purpose or nature of a trust and this has been done by Mrs. Catching, the trustor; and if the conveyance to Hardin and the conveyance by the trustee to W. B. Catching were in furtherance of this trust, as we believe they were, then the court erred in setting aside that conveyance. This is not what would be termed a resulting trust, which is a trust raised by implication or construction of law and is presumed to exist from the supposed intention of the parties to the transaction apart from any contract. It is an express trust, the nature of which is undisclosed, but we are not left to conjecture as to its objects and purposes.

In *Caldwell, et al. v. Caldwell*, 7 Bush 515, we find that one Alexander Caldwell was desirous of leaving his property by will to his six children, in equal parts, but James, one of his sons, being at that time a soldier in the Confederate army, and the testator being in doubt as to said son's right to hold property, he devised the home place to his remaining children on what the court says was a latent trust, that if James should ever return and be capable of holding the title they should convey it to him, "and this," says the court, "according to satisfactory oral testimony, they understood and tacitly agreed to fulfill." Upon his return from the war two of his brothers, true to the trust, conveyed him one-fifth of the land, the others refusing to convey. In this opinion, by Chief Justice Robertson, the court says: "Implied trusts being excepted from the statutes of frauds and perjuries, if the facts establish such a trust in this case, no written memorial of it was necessary for enforcing it, nor was the oral testimony incompetent on the alleged ground that it contradicts the will." . . . "The competency of oral testimony for establishing and enforcing such trusts as that claimed in this case is prescriptively recognized by undeviating authorities, among a great multitude of which we only cite the following: *Drakeford v. Weeks*, 3 Atkins 639; *Barrow v. Greenhough*, 3 Vesey 152; *Strickland v. Aldridge*, 9 Vesey 519; *Maislar v. Gillispie*, 11 Vesey 639; 2 Powell on Devises, 415." See also *Smith v. Smith*, 121 S. W. 1002; *Sherley v. Sherley*, 97 Ky. 512.

The testimony of Mrs. Catching and her husband as to the nature and purpose of this trust not being success-

fully attacked we must presume that it is as stated by them, hence the record does not present sufficient grounds for setting aside the deed from W. B. Catching and wife to S. A. Lovelace, and it will have to be upheld.

Many other points are discussed in the briefs of counsel; among others, whether or not suits or pleadings attacking the Lovelace deed were in time under section 1911 of the statutes. It will be unnecessary, however, to discuss or decide these points.

The motion of John R. Boreing for an appeal is objected to because he was not a party to the original appeal. His motion will have to be overruled because of the conclusions we have reached.

Wherefore the judgment of the lower court as to paragraph 11 is reversed and the court will enter a judgment dismissing the petition and all other pleadings in so far as they asked to cancel or set aside the deed of April 27, 1914, from W. B. Catching and wife to S. A. Lovelace, and the deed from S. A. Lovelace and wife to Fred W. Weitzel, receiver, dated Feb. 2, 1915. In all other respects the judgment is affirmed.

Louisville & Nashville Railroad Company v. Baker's Administrator.

(Decided March 7, 1919.)

Appeal from Rockcastle Circuit Court.

1. **Trial—Peremptory Instruction.**—A peremptory instruction is proper only after admitting every fact shown by the plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, plaintiff fails to establish his case.
2. **Appeal and Error—Weight of the Evidence.**—Whenever an examination of the record discloses the fact that the verdict is clearly and palpably against the weight of the evidence it is not only the right but the duty of the court to reverse and remand for a new trial.
3. **Trial—Argument of Counsel.**—Argument of counsel should be limited to matters within the record or to fair and reasonable deductions arising therefrom.

JOHN W. BROWN, C. C. WILLIAMS and BENJAMIN D. WARFIELD for appellant.

BETHURUM & LEWIS, W. T. SHORT, E. C. O'REAR and J. B. ADAMSON for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Reversing.

Charles Baker, as administrator of Eugene Baker, instituted this action in the court below against defendant seeking damages for the death of his intestate, it being alleged in the petition that decedent was assaulted and ejected from a train near Ford, Ky., and thereby caused to lose his life. From a verdict in favor of the plaintiff this appeal is prosecuted.

The contention of the defendant is that a peremptory instruction should have been given in its behalf. It also complains of the instruction given and of counsel's argument to the jury.

The case is beset with some rather unusual circumstances. Decedent lived in Richmond, and it appears that in company with several companions he started in the direction of Winchester on the afternoon of December 22, 1914. According to the expression of some of the witnesses they were "hoboing;" i. e., they had taken passage on a freight train without paying therefor, in other words "beating their way." The time they left Richmond is uncertain. Three witnesses testified to having seen decedent get off a train at Shearer, a station north of Ford, and a like number saw him get on a train there northbound; five witnesses testified to having seen decedent in Winchester the evening of the accident; most of these had gone to Winchester for the purpose of getting whiskey; several of the witnesses testified they saw Baker at the depot that night waiting for a train to take him to Richmond or Berea, and two testified that they got on a southbound train at Winchester that night with the decedent and were in the smoking car of defendant's train. This train is known as No. 31. One of these witnesses, Grover Neal, testified that decedent had a little argument with defendant's conductor, but there was so much noise he could not tell what they were talking about. This argument took place along about Elkin, which is a station a short distance north of Ford, and after the argument started he left decedent and the conductor, going to another part of the car, and when he returned in ten or fifteen minutes afterwards he did not see the decedent, but he saw a hat "lying there" which looked like decedent's hat. David Himes, the other witness, testified as follows: "Q. How long did Eugene Baker stay on that train? A. Well, I couldn't say. Not

very long, though, I shouldn't think, or I didn't see him on the train. After we got up towards Ford, towards Ford there, there come up some trouble— Q. Some trouble between him and the conductor? A. Yes, sir. Q. Will you go ahead and tell the jury the nature of that trouble? A. We were all sitting there on the seat, talking and laughing and going on, and the conductor walked up and we were talking very loud, and the conductor walked up to Mr. Baker and told him he was going to put him off the train—was what he said—and they kind of got into a racket and I got up and walked out of the coach. Q. What was said between them? A. The conductor says, 'G— d— you, I am going to put you off of this train.' I believe that is the words he spoke. . . . Q. Tell the jury what position he was in with reference to Baker at the time he made the remark to him. A. He was standing right up in Baker's face when he made the remark. Q. What was Baker saying? A. Well, Baker was talking a little to him—wasn't talking very much, I don't think. Q. When that conversation was going on, what did you do? A. I got up and walked out of the coach and went into the ladies' car. Q. What made you do that? A. I seen there was going to come up some trouble, and I walked out and went in the other car. Q. Did anybody else go out? A. Lots of people went out. I couldn't state who all. Q. Anybody that you knew? A. No, not that I knew, I don't reckon, at all. Q. Did you go back into the car? A. Yes, sir. Q. After you got back there, tell the jury if anything happened to the train. A. Yes, sir, the train stopped a very few moments about Ford. They said it was about Ford. Q. Did you go back into the smoker after the train stopped? A. Yes, sir. Q. Where was Eugene Baker then? A. I never saw him any more at all. Q. You mean you never saw him after you left the car? A. No, sir. Q. Did you see anything that belonged to him? A. Yes, his hat lying in the floor. Q. Now, when the train stopped, did you see anything of him? A. No, I raised the window and looked out and they was dragging a man out from under the train; looked to me like a colored fellow, best I could tell about it."

On cross-examination witness testified as follows: "Q. And you say that he and the conductor got to talking and when they got to talking you went back into the other car? A. Yes, sir. Q. Had the conductor taken hold of him? A. Yes, sir, the conductor, I believe, had

hold of him. Q. You believe? A. Yes, sir. Q. Well, are you sure of that? A. Yes, sir. Q. In what manner did he have hold of him? A. Just walked up and took hold of him and called him that name. Called him what name? A. Said G— d— him, he was going to put him off the train. . . . Q. You went out into the ladies' coach; and what was Eugene Baker doing when you went in there? A. Standing up talking to the conductor. Q. He was standing talking to the conductor when you went out, was he? A. Yes, sir. Q. How long did you stay in the ladies' coach? A. Well, I stayed some little bit. Q. Well, how long? A. Until I thought the trouble was all over and I seen them dragging this man out from under the train, and I went back into the smoking car."

This, in substance, is the testimony introduced on behalf of the plaintiff. For the defendant its conductor and flagman on the southbound train testified that decedent was not a passenger on their train; they had no difficulty of any kind, and that the events testified to by the witnesses Neal and Himes did not occur.

J. D. Johnson and his brother Oscar Johnson had gone to the station at Ford to meet their brother Jesse who was coming home for the holidays. They were walking along the track to keep their blood in circulation, and the younger of the two discovered something lying between the rails, and upon examination they found it was a man, and they dragged him off the track. This was before the arrival of No. 31. Seeing a light in the home of operator Johnson they notified him, also Sheeler, the agent at Ford, and after reaching the latter's house they heard No. 31 whistle and hastened back to the station and got there just at the time the train arrived. They say it was 20 to 30 minutes from the time they first discovered this body until the train arrived and the body was there when they reached the station after notifying Johnson and Sheeler.

J. F. Johnson, the company's operator at Shearer, lived at Ford. He testified that shortly after he reached his home that night, and before the arrival of No. 31, J. D. Johnson and Oscar Johnson came to his house and told him "they had found this man on the track—killed." He told them to notify Mr. Sheeler, and this it appears they did. Sheeler testifies that on that night, fifteen or twenty minutes before the arrival of No. 31, and after he retired, J. D. Johnson notified him there was a dead

body at the depot. Johnson reached the station shortly after No. 31 arrived; Sheeler got there just as No. 31 was fixing to leave.

E. K. Broadbuss, a school teacher at Ford, and Dr. J. T. Pennington that same evening had been at a social gathering on the Madison county side of the river from Ford. They passed the station between eleven and eleven-thirty, and they saw this body from 15 to 20 minutes before the arrival of No. 31.

The flagman on the passenger train testified that when the train reached Ford he saw the body of a man on the platform; thus we have at least six witnesses who saw the body that was identified as that of Eugene Baker on the platform at Ford from 15 to 30 minutes before the arrival of No. 31, and four of these are disinterested witnesses, whose credibility and character are unimpeached, but as to the two witnesses for the plaintiff, who detailed the events on the train, their credibility is attacked. Hence we have two states of facts that are irreconcilable. If decedent was in Winchester and became a passenger on train No. 31, then the witnesses for defendant could not have seen his dead body at Ford some time before the arrival of that train, or conversely stated, if the witnesses for the defendant are correct, then those who testified in behalf of plaintiff could not have seen him in Winchester at the time stated nor could he have taken passage on No. 31.

Counsel for the defendant, with great vigor and earnestness, insist there was no evidence to take the case to the jury. It is a close case on the facts. We understand the rule to be that where there is any evidence for the plaintiff, or any fact shown from which the inference may be plainly drawn that the accident occurred as testified to by witnesses in his behalf, the question is one for the jury, although the evidence for the defendant may be to the effect that the accident happened in an entirely different manner. To entitle defendant to a peremptory instruction the rule in this state is, that if, after admitting every fact shown by the plaintiff's evidence to be true as well as all reasonable inferences that can be drawn therefrom, the plaintiff failed to establish his case, a peremptory is proper. Two juries have found for the plaintiff in this case. The reason for the granting of a new trial after

the first verdict is not shown by the evidence, but under the scintilla rule we are not prepared to say that a peremptory in this case was proper.

Under sub-section 6 of section 340 of the Code, a new trial is authorized when the verdict or decision is not sustained by sufficient evidence. Under this section the court will not set aside a verdict merely because it is against the preponderance or weight of the evidence, nor because of the numerical superiority of witnesses. The verdict must be flagrantly against the weight of the evidence. But when such a state of case is presented it is not only the right but the duty of the court to reverse and remand for a new trial. *Continental Ins. Co. of N. Y. v. Hargrove*, 131 Ky. 837, 143 Ky. 400; *Vincent, etc. v. Willis*, 26 Rep. 842; *C. & O. Ry. Co., et al. v. Johnson*, 145 Ky. 481, 151 Ky. 809; *L. C. R. R. Co. v. Long*, 146 Ky. 170; *C. N. O. & T. P. Ry. Co. v. Martin*, 146 Ky. 260, 154 Ky. 348; *Wickliffe Mfg. Co. v. Wilson*, 169 Ky. 468; *North Jellico Coal Co. v. Stewart*, 173 Ky. 745. The verdict in this case being so clearly and palpably against the evidence a reversal must be ordered.

2. Defendant complains of the argument of plaintiff's counsel to the jury. In view of the fact that the case is reversed for other reasons we will not extend this opinion by commenting upon this point, other than to say that the language used was highly improper and upon a retrial of this case counsel will be careful not to make use of this or similar language. Argument of counsel should be limited to matters within the record, or to fair and reasonable deductions arising from the record.

3. Complaint is also made of instruction one given by the court to the jury, in the use of the expression "decident was forcibly ejected from the train." There was no evidence to this effect and if the evidence upon the next trial is substantially the same as that in the record before us this expression should not be used.

Wherefore the judgment of the lower court is reversed for further proceedings consistent with this opinion.

Louisville Trust Company, et al. v. McCabe.

(Decided March 18, 1919.)

**Appeal from Jefferson Circuit Court
(Chancery Branch, First Division).**

Contracts—Covenant to be Performed—Pleading and Proof.—One who sues upon a contract, which contains a covenant to be performed by him, and upon which the promise of the other party depends, can not recover without alleging and showing the performance of the condition precedent by him.

O'NEAL & O'NEAL and HENRY J. TILFORD for appellants.

G. E. ZIMMERMAN, WM. W. CRAWFORD and J. JOSEPH HETTSINGER for appellee.

OPINION OF THE COURT BY JUDGE HURT—Affirming.

This action was brought by the Louisville Trust Company, and W. E. Baxter, whom we will call the plaintiffs, against L. McCabe, whom we will, hereafter, refer to, as the defendant, to require him to pay to the Louisville Trust Company, the sum of \$20,000.00, the right to recovery of which the plaintiffs claimed, arose from a contract, in writing, which they, and the defendant, and others, not parties to this action, had, theretofore, entered into. The defendant interposed a special demurrer, and, also, a general demurrer to the petition, and to the petition, as amended. The special demurrer was overruled, but, the general demurrer was sustained, and the plaintiffs, declining to plead further, and to stand upon the petition, in equity, as amended, it was dismissed by the court, and from the judgment, the plaintiffs have appealed. The contract was as follows: The preamble to the writing, which embraces the contract, describes the purpose of the contract, as follows:

“For subscription and the organization of a corporation (joint stock company, to be duly incorporated) for the purpose of taking over the stove, outfit and equipment business of W. E. Baxter, and two (2) United States patents pertaining to said business, manufacturing and marketing said stoves, outfit and equipment, and transacting such manufacturing and general business as the articles of this proposed company may specify.”

The agreements expressed in the contract, may be divided as follows:

(1) The subscribers, desiring to purchase and to own the stove, outfit and equipment business and the two patents pertaining thereto, have agreed, with W. E. Baxter, to purchase, from him, the stove, outfit and equipment business, patents pertaining thereto, steel dies, specifications, trade names and good will, upon the following terms and conditions, viz.:

(a) A corporation shall be created, with a capital stock, of \$50,000.00, divided into five thousand shares, of the par value of ten dollars, each. Fifty shares shall be sold or set aside, for the expenses of organization of the corporation; two thousand shares at par, to be used for working capital; four hundred shares are to be given for securing subscriptions for the two thousand shares, above named; fifty-one per centum of the stock is to go to Baxter, as the purchase price of his stove, business, patents, dies, trade names, good will, etc.

(b) That no one person shall have a controlling interest in the corporation, Baxter agrees, that the organization agent shall secure *bona fide* subscriptions for the part of the stock to be allotted to him, "share for share with the company's stock," until thirteen hundred shares of the stock to be allotted to Baxter, have been subscribed for, and the agent is to have 20% in stock of the thirteen hundred shares, for finding subscriptions for them, thus reducing the holdings of Baxter to one-fourth of the shares of the capital stock, so that the control of the corporation, shall be held by a board of directors, elected by the stockholders.

(c) Subscribers to the contract may be secured to any amount, and one or more copies of the contract, may be circulated by one or both parties, and when the subscriptions on all the copies of the contract shall equal or exceed twenty thousand dollars, the contract may be closed, by either Baxter or the fiscal agent signing the contract, and all the copies taken, together, shall constitute the contract between the parties.

(d) Each subscriber, to the contract, agrees to pay the amount subscribed by him and no more, when the subscription list amounts to the sum of \$20,000.00, subscribed, and the contract is closed, by being signed by Baxter or the fiscal agent.

(e) The contract is not to be binding, on any one, unless subscriptions to the amount of \$20,000.00, or more, are made for the stock, and no subscriber is liable for anything more than the amount of his individual subscription, when the contract shall have been closed, by being signed by Baxter or the fiscal agent.

(f) After the subscriptions have been collected and paid to Louisville Trust Company, fiscal agent, and the corporation created and organized, and the stock, to be received by Baxter, ordered issued and delivered to him "in the amount and manner, as agreed to, in detail, herein," then Baxter will deliver, to the subscribers, the property heretofore mentioned.

The paper, at this point, is dated and subscribed by W. E. Baxter, and the Louisville Trust Company, and then follows, a clause, which we will designate, by the letter, "g" and provides, that;

(g) The subscribers for shares of stock for the purpose of making a corporation and owning the business, patents, etc., and to fully carry out the intention of the subscribers, agree to come together, when requested by Baxter or the fiscal agent, and to organize the corporation in accordance with the laws of the state, by electing the board of directors, and issuing the certificates for stock to the subscribers, for such stock as they have paid for. Then follows the signatures of the subscribers and the number of shares subscribed for, by each, as follows: W. E. Morrow, Eugene Stuart, F. J. Goby, Priest Frazier, Jno. J. Saunders, Geo. T. Cross, Frank Varble, Geo. H. Fisher, ten shares each; Dayton T. Mitchell, fifty shares, and the defendant, L. McCabe, two thousand shares.

It is averred, in the petition, that the paper, containing the contract, was delivered, unsigned, to the Louisville Trust Company, and thereafter, on February 7, 1917, it was subscribed by the parties, above named, including the defendant, and who attached to their signatures, the number of shares, each bound himself to accept and pay for, respectively, and thereafter, on March 13th, it was signed by W. E. Baxter, and the subscription list closed, and thereafter, on March 14th, the Louisville Trust Company gave notice to each of the subscribers, that the subscription list had been closed, and requested them to meet, together, to pay to it the amounts of their respective subscriptions, and to organize a corporation,

in accordance with the contract, and the plaintiffs averred their readiness and ability to transfer, to the corporation, the property owned by Baxter for the purpose of the owning and exploiting of which, the corporation was to be organized, and the readiness and willingness of all the subscribers to meet and fully perform their respective parts of the contract, except the defendant, McCabe, who refused to pay his subscription or in any manner, to perform his contract, and prayed for a judgment against him, in behalf of the Louisville Trust Company, for the sum of \$20,000.00, the amount of his subscription.

A general demurrer to the petition was sustained. The plaintiffs then amended their petition, by alleging, that certain of the subscribers to the contract, had delivered checks to the Louisville Trust Company, in payment of their respective subscriptions, another had executed a note, for his subscription to the Louisville Trust Company, and all the subscribers, had subscribed in good faith, and would pay their respective subscriptions, when a judgment should be recovered against the defendant, or else they would be compelled to do so, by suit.

The court, upon motion, struck from the amendment, the allegation, with regard to the good faith, with which the subscriptions had been made, and then sustained the general demurrer to the petition, as amended. The defendant, appellee, here, insists that the court erred, in overruling the special demurrer, which related to the capacity of the plaintiffs to sue, while the appellants insist, that the court erred, in sustaining the general demurrer to the petition as amended. We do not consider it necessary to enter upon a discussion, as to the right of a subscriber or a trustee to whom preliminary promises of the payment of subscriptions to the capital stock of a corporation to be thereafter formed, are made, to sue subscribers to recover the amount of their subscriptions, nor whether such may be maintained until after the corporation is organized, nor the right of one, who has expended money upon the faith of the subscriptions to recover same from the subscribers, but, conceding that a right of action, under certain circumstances, may lie, on the part of the above named persons, we will consider, whether the plaintiffs, under the terms and conditions of the contract sued on, have shown themselves entitled to maintain an action against the defend-

ant for failure to pay the amount of his subscription, to the plaintiff, Louisville Trust Company, as his failure to participate in the organization, of the proposed corporation did not prevent its organization, as any three of the subscribers could have organized the corporation. It will be observed, that in accordance with the terms of the contract, the parties agreed to form a corporation, the capital stock of which should consist of five thousand shares. Fifty shares should be sold or set aside for organization expenses. Two thousand shares, or the proceeds thereof, should be used for a working capital, and four hundred shares should be received, by the trustee, for securing subscriptions for the two thousand shares to be used for working capital. The two thousand, four hundred and fifty shares above named, comprised the stock denominated the "company's stock." The plaintiff, Baxter, was to receive the remaining two thousand, five hundred and fifty shares of the stock, as the price of the property, which he was to turn over to the subscribers, including the defendant.

The exploitation of this business and property, was the purpose for which the corporation was to be organized. In the first clause of the contract, the parties expressly provide, that the agreement to purchase the property, and to pay the amounts subscribed by them, severally, to the trustee, for stock in the contemplated corporation, is made "on the following terms and conditions." One of the terms and conditions, is the formation of the corporation to take over the property and exploit the business of Baxter, and to pay him for his property, by transferring to him two thousand, five hundred and fifty shares of the capital stock. Another of the conditions upon which the agreement to purchase the property and to pay the amount of the subscriptions to the trustee, was, that the trustee should secure *bona fide* subscribers for thirteen hundred shares of the stock to be allotted to plaintiff, Baxter, and that the trustee should secure the subscriptions for Baxter stock, as it secured subscriptions for the company's stock—that is to say, in the language of the contract, "share for share with the company's stock, until thirteen hundred shares of said first party are disposed of." The trustee was to receive 20% of the thirteen hundred shares from Baxter, for securing the subscriptions for his stock. The reason given for this condition, in the contract was, that

it would be so, that no one person should have a controlling interest in the corporation, when formed, and by the subscriptions for the thirteen hundred shares of the stock to be received by plaintiff, Baxter, his holding should not exceed one thousand, two hundred and fifty shares, and the control of the corporation would be in the hands of a "board of directors to be elected by the stockholders." To comply with this condition, it was necessary for the trustee to secure subscriptions for one thousand and forty shares of the thirteen hundred shares, as it would receive two hundred and sixty shares, for securing the subscriptions. According to the contract, this was agreed to be done, as the subscriptions were secured for the first thirteen hundred shares of the company's stock, which were subscribed for. The subscriptions for the thirteen hundred shares of Baxter's stock were not to be included, in the subscriptions for two thousand shares of stock to be subscribed for, before closing of the subscription list, by Baxter or the trustee subscribing same, because, if so, that would give the trustee six hundred and sixty shares of the stock for securing subscribers for the two thousand shares, instead of four hundred shares, as stated, in the second clause of the contract. If the subscriptions, beside those of defendant should be considered as having been obtained for Baxter's stock, they only number 120 shares, instead of 1040 shares. After these conditions, follow the covenants touching the subscriptions to be secured, and the promise to pay the amount of the subscriptions. The promise to pay the amount of the subscriptions to the trustee, and the conditions under which the promises were made, were necessarily dependent upon the performance of the foregoing conditions. It appears, that the condition, that the subscribers should be obtained for Baxter's stock, was a very material and essential part of the consideration for the promise of the defendant and the other subscribers for stock, that they might not invest in an enterprise, the control of which would be entirely at the mercy of one stockholder. The defendant had a right to depend upon that condition being performed, and the subscriptions for the thirteen hundred shares of Baxter's stock, not being required to be shown upon the contract subscribed by defendant, he would necessarily not know, that the condition had not been complied with, when subscribing himself, but would have the

right to rely upon its being done as covenanted, in the contract. The petition fails to allege, that the condition, in regard to securing subscriptions for the thirteen hundred shares of the stock to be allotted to Baxter, has ever been complied with. It might be insisted, that the condition could be waived by Baxter, but, it was not inserted in the contract, and was not to be performed for his benefit, but, was made to induce subscriptions for the company's stock, and for the benefit of such subscribers.

It is insisted, that the condition is a subsequent one, to the promise of defendant, but it does not so appear. It precedes the promise to pay by the subscribers for the company's stock, and is one of the express conditions upon which the subscribers agree to form the corporation and pay for the stock. It is true, that in an after clause it is recited, that "after the collections of subscriptions for the purpose as herein set forth have been made by and paid to the fiscal agent, the Louisville Trust Company, and the corporation perfected and the first party's stock allotment voted and turned over to said first party, in the amount and manner, as agreed to in detail herein, etc," but, this does not make the condition a subsequent one, in the face of the explicit declaration, that the subscriptions for thirteen hundred shares of Baxter's stock, should be secured, "share for share," as the subscriptions for the company's stock, should be secured, until thirteen hundred shares have been subscribed for. It does mean, that the entire two thousand, five hundred and fifty shares are to be turned over to Baxter, but, "in the amount and manner as detailed herein"—that is thirteen hundred shares of it to be received by the subscribers for it.

Otherwise, the reason given for the condition, would fail, as Baxter would have a controlling interest, and could elect any directorate, he might choose. One who subscribes for stock in a corporation, either organized, or to be organized, upon a condition is entitled to have it performed, before being required to pay the subscription, as in any other kind of contract. The plaintiffs failing to allege the compliance with this condition, they failed to manifest a right to recover against the defendant, and the general demurrer was properly sustained.

The judgment is therefore affirmed.

George, et al. v. Ford.

(Decided March 21, 1919.)

Appeal from Pike Circuit Court.

1. **Estoppel—Relying or Acting Upon Representations.**—A person who induces another to believe and act in a certain manner will not afterwards be permitted to prejudice or injure such person because of the acts or things he did under the belief that they were consented to.
2. **Estoppel—Acts Inducing Payment of Money.**—Acts and conduct of the appellants in inducing the appellee to pay money under contract estop them from now claiming that the contract had been cancelled and annulled.

JAMES M. ROBERSON and H. H. COOPER for appellants.

J. J. MOORE for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

Under an agreement dated September 14, 1916, appellant, George, in consideration of the agreement on the part of his co-appellant, Nerny, to subscribe for \$3,000.00 of stock in the Detroit-Kentucky Coal Company (hereinafter referred to as the coal company), agreed to assign to Nerny \$1,500.00 par value of George's holdings in said company immediately upon the payment of said \$3,000.00. For the sake of brevity said appellants will be referred to by their surnames.

George was president of the coal company and Nerny vice-president. Between November 8, 1916, and January 12, 1917, Nerny paid to the coal company, pursuant to said agreement, the sum of \$2,534.17, leaving a balance due of \$465.83; Nerny claimed he had paid said balance but this was denied by the appellant George. Representing that he was the owner of 340 shares of stock in the coal company and entitled to the 150 shares referred to in the previous agreement, having fully complied with the terms thereof, Nerny agreed to and did sell and transfer to one Kandt all of his stock in the coal company, including the 150 shares above referred to, the consideration being \$3,500.00, to be paid, \$10.00 cash upon the execution and delivery of the contract; \$990.00 on or before June 9, 1917, and \$2,500.00 on or before July 9, 1917.

June 7, 1917, Kandt for a valuable consideration sold, transferred and assigned to appellee all of his right, title and interest in and to said contract, including the 150 shares of stock above mentioned. Appellee paid the amount agreed to and had issued to him 340 shares of stock in the coal company.

Appellee (plaintiff below) alleged in his petition that on June 9, 1917, and before he paid any money under the contract assigned to him by Kandt, he entered into a verbal agreement with the appellant George by which it was agreed that if appellee would comply with the contract hereinabove referred to he (George) would cause to be issued to the appellee the 150 shares of stock in question, and this agreement was confirmed by a letter dated June 14, 1917, addressed to the appellee by the appellant George. The letter is made a part of the petition, and contains this language: "In the total he had paid \$2,534.17, which leaves him to fulfill a contract between he and I to benefit the company the difference of \$465.83. He has credited himself with salary and issued to himself stock to make up the difference and that is not cash as our agreement called for. I will gladly issue to you the \$1,500.00 of my stock when this agreement is fulfilled according to the contract."

It was further alleged in the petition that George was anxious for appellee to acquire the interest of Nerny. The prayer of the petition was that George be enjoined and restrained from selling the 150 shares, as it is alleged he was attempting to do, and that he be compelled to transfer and assign same to appellee.

The material averments of the petition were put in issue by an answer, George admitting the execution of the contract of September 14, 1916, but claiming that Nerny had not complied therewith, in that he did not make the payments immediately as therein provided. He denied that the letter of June 14, 1917, confirmed any verbal agreement with appellee; he alleged that he made a demand on Nerny in January, 1917, to furnish \$350.00 to take care of a payroll of the coal company; this Nerny failed to do. An amended petition set forth the fact that the coal company had filed suit against Nerny seeking to recover the balance of \$465.83, and had attached sufficient property of Nerny to pay said debt and costs. At the time this amendment was filed appellees paid into court the sum of \$465.83, same to be paid the coal com-

pany in the event it was decided Nerny was indebted to this extent, or any part thereof, by reason of his contract.

In an amended answer George alleged that at the time Nerny failed to furnish the money for the payroll, amounting to \$350.00, it was agreed between them (George and Nerny) that the agreement on the part of George to assign and transfer to Nerny the 150 shares of stock should be cancelled and annulled, and it was further agreed that the copies of said contracts would be destroyed, and one of them was in fact destroyed forthwith—this was January 17, 1917.

Nerny answered setting forth the original agreement and the subsequent agreement to cancel so much thereof as required George to deliver the 150 shares of stock in question, and that appellee was not entitled to said 150 shares, but alleged that his copy of said agreement was not destroyed because he was not satisfied with the actions of said George in his relations with the coal company.

The coal company filed an answer setting forth its suit against Nerny, and by reason thereof it had attached sufficient funds to secure this indebtedness; that it had no desire to prevent the issuance of 150 shares of stock to appellee.

In a reply to the answer of George appellee set out the letter of June 14, 1917, and of the writer's willingness to transfer this stock to appellee upon the payment of the money, alleging that by reason of said letter and the representations made by George, and which were long after the alleged failure of Nerny to pay the balance aforesaid; appellee paid the consideration called for in the contract between Nerny and Kandt, which appellee had assumed, and further that he had deposited with the clerk \$465.83, to be held by the court to secure the payment of this sum, in the event it was found to be due the coal company.

Replying to the amended answer of George and the answer of Nerny, appellee denied the affirmative allegations of said pleadings; alleged that George recognized the existence of said contract and represented to the appellee that the contract was in full force and effect, and induced appellee to part with his money by reason of said representation; and that he would not have entered into said contract to purchase said stock, nor would he

have paid anything thereunder but for said representation. No disclosure was made to appellee by George or Nerny as to the alleged agreement to cancel the original contract; appellee alleged that both the appellants were estopped to plead or rely upon the rescission or cancellation of said contract.

In a second amended answer of George and an amended answer of Nerny, it is alleged that Nerny informed Kandt, appellee's assignor, of the agreement between George and Nerny to cancel the contract, and that appellee did not pay the balance referred to until after the suit was brought, and the letter having been written, after the sale and transfer of the contract to appellee, there was no consideration for same.

The affirmative allegations of said pleadings were denied in a reply, in which appellee set forth a letter dated June 6, 1917, from Nerny to George and the answer of George under date of June 8, 1917. In his letter Nerny says:

"Re letter of the 2nd. In relation note at the bank I want it paid. Your agreement was to pay it from the first money you received, and Kandt tells me you paid yourself for what you loaned the Co.

"Kandt tells me you want to repudiate the \$1,500.00 stock you owe me. If that is a fact its nice treatment you are giving me after my loyalty and sacrifices to stand by you."

George, in his reply, writes: "I have not the money to take care of this note, neither has the company. Consequently your stock is held here and you stand a chance of losing it. In regard to that contract between you and I, that was to be taken care of and stock issued to you when you paid \$3,000.00 cash to start off the company, and up to the present date you have only paid in to the treasure \$2,534.17 according to your own figures, the balance due the company is \$465.83."

It was alleged that by said letters both appellants recognized the existence and validity of the contract at that time, this being subsequent to the date of the alleged agreement between George and Nerny to cancel the agreement as to the 150 shares.

A rejoinder was filed to this reply. Several demurrers were filed during the course of the proceedings, and the case was finally submitted on the demurrers of

the appellee to the answer as amended of George and Nerny; also submitted upon the demurrers of appellants to appellee's replies.

The court rendered a judgment sustaining the demurrers to the answers as amended of the appellants and overruled their demurrers to the appellee's replies. Appellants having declined to plead further, it was ordered by the court that George be enjoined and restrained from selling the 150 shares of stock in the Detroit-Kentucky Coal Company, and ordering and directing him to transfer said stock to appellee within 30 days, and if not so transferred within that time the proper officers of the coal company were ordered and directed to cancel said stock upon the books of the company and to issue in lieu thereof a certificate for 150 shares of stock to the appellee. From this judgment an appeal has been taken to this court.

We have given the substance of the pleadings at some length, the case having been disposed of on the several demurrers mentioned.

It is contended by appellant, in his brief, there was no consideration for the promises contained in the letter of June 14, 1917, same having been written and delivered after the transfer from Kandt to appellee, that the money was not paid immediately as called for in said contract, and further that appellants had cancelled the contract to transfer 150 shares

While admitting Ford had no knowledge of the alleged cancellation appellants rely upon the familiar doctrine that an assignee can be in no better position than his assignor. Pomeroy's Equity Jurisprudence sec. 709; Bitzer v. Mercke, 111 Ky. 299.

Appellee concedes this to be the law, but contends the rule does not apply to this case, because there is an exception recognized by the law in transactions pertaining to the assignment and transfer of shares of stock. Authority for this position is found in Pomeroy's Equity Jurisprudence, sec. 710.

But there is another issue in this case, and one, in our judgment, conclusive of this appeal, that of estoppel—relied upon by appellee—and which seems to have been the ground upon which the lower court sustained the appellee's demurrers and overruled appellants' demurrers. Estoppel is so called "because a man's own act or ac-

ceptance stoppeth or closeth up his mouth to alleage or plead the truth." Cokes Littleton, sec. 335a.

In *Trimble v. King*, 131 Ky. 1, speaking of the doctrine of estoppel, the court says: "It may be said to rest upon the doctrine that a person who has induced another to believe and act in a certain manner will not afterwards be permitted to prejudice or injure such person because of the acts or things that he did under the belief that they were consented to."

The allegation that appellants between themselves agreed, because of the non-payment of the \$465.83, to cancel the contract in so far as it required George to transfer the 150 shares of stock is quite inconsistent with the letter of June 6th, 1917, written by Nerny to George and the latter's response thereto under date of June 8, 1917, in both of which the contract is treated as being valid and subsisting. If there had been a cancellation or annulment of this agreement, which is supposed to have taken place prior to the date of these letters, we see no reason for writing these letters; furthermore, appellee did pay for the stock in question the sum of \$3,500.00, including the deposit in the court, thereby fully complying with his agreement, but this money was not paid until after the agreement on the part of George made to appellee, that he (George) would comply with the contract in every particular if appellee would pay to Nerny the amount called for, and this verbal agreement was confirmed in the letter of June 14, 1917, from George to appellee, and but for the assurance contained in said letter appellee alleges he would not have paid same.

In our judgment the record discloses such acts and conduct on the part of appellants as to estop them from setting up or relying upon the defenses set forth in the pleadings.

In speaking of estoppel we find in 16 Cyc. 719, this statement: "There are two sorts of what has been termed 'estoppel by contract,' viz.: (1) estoppel to deny the truth of facts agreed upon and settled by force of entering into the contract, and (2) estoppel arising from acts done under or in performance of the contract."

No special benefit will be gained by going into a detailed discussion or consideration as to the meaning, application, or elements of the doctrine of estoppel. We are satisfied from an examination of the record before us

that appellee, relying upon the statements made to him by George, paid the money referred to in the pleadings and but for the representation so made he would not have parted with his money.

As to the point that there was no consideration for the promise of George, contained in his letter of June 14, 1917, it is sufficient to say that if Nerny had paid the entire amount, the contract would then have been complied with and the stock should have been issued, and if the balance referred to had not been paid, then his letter was an invitation to the appellee to pay it, and he agreed in said letter to issue the stock when the agreement was fulfilled, that is, the balance paid. When appellee ascertained there was some question as to the payment of this balance, he then paid the amount into court. It will be remembered that the company itself filed a suit and attached funds sufficient, according to their pleadings, to insure the payment of said amount, so we think the plea of no consideration is without merit.

The point that the money was to have been paid immediately, and failing in this the contract was not binding, we think was waived by the letter of June 14, 1917, because at that time George was willing to carry out the contract upon the payment of the money. As to the cancellation alleged of the contract between George and Nerny it will be recalled that this transaction took place after there had been a payment in fact of \$2,534.17, and it is hardly probable that they would have cancelled this contract after the payment of this substantial sum. Furthermore, the letters between Nerny and George, of June 6th and 8th, 1917, clearly show that at that time they did not treat the contract as having been cancelled, nor did appellee have any knowledge of the alleged cancellation, and even though he had, the letter and acts of George were so inconsistent with any such fact as to estop George from now claiming the contract was cancelled.

The court did not err in reaching the conclusion which it did. The judgment is affirmed.

**Bates & Rogers Construction Company and Workmen's
Compensation Board of Kentucky v. Allen**

(Decided March 28, 1919.)

Appeal from Mason Circuit Court.

1. **Appeal and Error—Workmen's Compensation Act—Findings of Fact by Board—When Conclusive.**—The rule as to the conclusiveness of findings of fact only applies when there is a disputed issue of fact and on the facts the board makes a finding.
2. **Appeal and Error—Workmen's Compensation Act.—Where Facts Are Not Disputed the Question is One of Law—Review by Courts.**—If there is no issue of fact or if the facts are undisputed the question becomes one of law and the finding of the board is one of law and not of fact, and the right of the court to review it is authorized by that provision of the law allowing review when the order, decision or award is not in conformity with the act.
3. **Master and Servant.—Workmen's Compensation Act—Knowledge of Injury By "Foreman" or "Boss."**—Knowledge of the injury by a "foreman" or "boss" will be the same as if the employer in person had knowledge.
4. **Master and Servant.—Workmen's Compensation Act.—"Knowledge of Injury"—What Is.**—"Knowledge of the Injury" as used in the statute is not answered by knowledge of an accident or that an employee "got hit" with something. The knowledge that an employe has received an injury must be sufficient to give reasonable information to the employer of the nature of the injury.
5. **Master and Servant—Workmen's Compensation Act—Written Notice of Injury—Sufficiency of.**—A written notice of the injury must be sufficient to apprise the employer in a general way of the nature of the injury.
6. **Master and Servant—Workmen's Compensation Act—Notice of Injury—What Will Excuse.**—The failure to give notice may be excused by "mistake or other reasonable cause," and whether the mistake or other reasonable cause will excuse the failure to give notice is a question to be determined by the facts of the particular case.
7. **Master and Servant—Workmen's Compensation Act—Notice of Injury "As Soon As Practicable."**—The words "as soon as practicable" should be given a liberal construction so as not to defeat without just cause the compensation to which a meritorious claimant is entitled.
8. **Master and Servant—Workmen's Compensation Act—Failure to Give Notice—What Will Excuse.**—Where the employer is not prejudiced by the failure to give notice as soon as it might have been given and the failure to give it earlier was occasioned by

an honest mistake on the part of the employe his claim should not be rejected on account of the delay in giving notice.

FRED FORCHT and STANLEY REED for appellants.

CHARLES H. MORRIS, Attorney General, D. M. HOWERTON, Assistant Attorney General, A. D. COLE and LAWRENCE S. LEOPOLD for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE CARROLL—
Affirming.

This case, under the Workmen's Compensation Act, is brought here by the employer, Bates & Rogers Construction Company, from the Mason circuit court, to which an appeal was prosecuted from the decision of the Workmen's Compensation Board by the appellee, Henry Allen, who had been denied compensation by the board.

There is no dispute about the facts, which are substantially as follows: Henry Allen was in the employ of the appellant, Bates & Rogers Construction Company, at lock and dam No. 33, on the Ohio river, near Maysville, Kentucky, during the month of November, 1916. He went from Louisville, Kentucky, where he obtained the employment through the agency of the State Free Employment Office, to Maysville, and about four days after he commenced work for the construction company he received the injury for which he claimed compensation.

He testified before the board, on the hearing of his claim, that the injury happened in this manner: "Well, I was tearing up the dinky track, the one the little engine hauls on, hauls the cars, and working on a kind of trestle; the men would take up the rail and carry it back, and where the angle iron holds them together they wouldn't come apart, there was a big heavy fellow called Cobb, and he was hitting on these pieces of iron that held the rail together with a sledge to loosen them so I could get them apart, and something flew up and hit me in the eye, and that's the way I got hurt."

Asked as to who he told about it and what occurred afterwards, he testified as follows: "A. At that time there was several men knew I got hit in the eye with something. I told the boss I got hit. Q. Who was the boss? A. Little short fellow they called Tom—wore a straight hat like a cow boy. Q. Do you know what his last name

was? A. No, sir; Tom is all I know. I was not there long enough to get acquainted. I was only there a little over a week. Q. Was Tom the man in charge of you? A. Yes, sir. Q. Representing Bates & Rogers Construction Company? A. He was their foreman. Q. How long did you continue to work after you received this blow in the eye? A. Well, I worked—that was in the morning—and I worked out that day and I worked the next day and the next morning I left; came back to Louisville. Q. The day after you were hurt did your eye show any evidence of being hurt? A. Well, it pained me all the time. When it was first hurt I just thought something was in there and would work out and quit hurting right away; I didn't have any idea it would terminate the way it did, but then it would feel all right for a while and commence hurting again and kept on until it got inflamed so I couldn't sleep. Q. Did you tell the foreman anything about it afterwards? A. Well, the foreman knew about it; knew when I got hurt; knew the last day I worked. Q. How did he know that? A. Well, I told him when I first got hit I was hit in the eye with something. Q. After you came to Louisville what did you do? A. Well, I came home and after I went and came home I couldn't work and I went to the city hospital. Q. How long were you in the hospital? A. I judge about eleven days. I went in on Monday and came out the following Sunday week. Q. Mr. Allen, what was the condition of your eye before you were struck with whatever substance struck you? A. I had good eyesight. Q. How is your sight in the injured eye since that blow? A. Well, I haven't got any sight at all. I can close this eye and tell light, that's all I can see. I can't see anything. Q. Do you know whether that condition was brought about by this blow in your eye? A. Well, I never had anything the matter with my eye in my life until I got hit with that piece, whatever it was, never had any diseases in my eyes or anything or any complaint. Q. Now, after you were released from the hospital, what attempt, if any, did you make to notify Bates & Rogers Construction Company of your injury? A. Well, I wrote them, the best of my memory, about three letters. Q. And when was the first one that you wrote? A. Well, it was before Christmas, and then I wrote one around Christmas, and then I wrote another letter I think a couple of weeks after Christmas and it came back. I wrote to the wrong place. I

had it Mayfield instead of Maysville, and then I went to Bob Lucas and he wrote a letter and kept a couple of letters for me. Q. There is an envelope; read how that is addressed. A. Well, that is Mayfield, Ky.; that's the way I wrote. Q. That is a stamped envelope? A. Yes, sir. Q. It has across the face the figure of a hand. 'Returned to the writer unclaimed.' Will you file that as part of your deposition? A. Yes, sir. 'Law Offices Robt. H. Lucas, 316-317 Louisville Trust Building, Louisville, Ky., January 30th, 1917. Bates & Rogers Construction, Mayfield, Ky. Gentlemen: I have been employed by Mr. Henry Allen, of this city, to represent him in a claim against you growing out of an injury which he received while in your employ on lock and dam No. 33 on or about November 1st, 1916. While engaged in his work he was struck in the eye with a piece of steel which caused him to lose the sight of his eye. Dr. Wolfe, in the Atherton Building, this city, has been attending him. Kindly investigate this matter and inform us whether or not we may expect a settlement and oblige, Yours very truly (Signed) Robert H. Lucas.' Q. What time in the morning was it you got hurt? A. Must have been around ten o'clock, nine or ten o'clock. Q. And you continued to work all that day? A. Until three that evening. Q. And went to work the next morning? A. Yes, sir, and worked until three the next evening. Q. How many doctors did Bates & Rogers Construction Co. have at their camp? A. If they had any I never saw them. Q. Did you ask for a doctor? A. I never heard anybody say anything about any doctor; I never heard of any doctors. Q. Did you ask any of the bosses for a doctor or for any medicine for your eye? A. No, sir; I asked one fellow where there was a hospital, and he said they had a place at Maysville where they taken men who was sick and hurt. Q. You say there was a man named Tom there who was your boss? A. Yes, sir, Tom. Q. Did he pay you off? A. I don't know—they called it a job and jump job—you can get your money any time. Q. Did you go to the office to get your pay? A. No, sir; you had to go to the commissary. Q. You did that, did you? A. Yes, sir. Q. Did you say anything to the commissary about getting hurt; about quitting because you were hurt? A. No, sir. Q. Or the man at the office? A. No, sir. Q. Did you tell the man at the commissary or the man where you got your money why you were

quitting? A. No, sir. Never told anybody but the foreman. Q. That is this man 'Tom;' you don't know his last name? A. No, sir, that's all I know him by—Tom. . . . Q. When you read that notice you knew you were working under the Workmen's Compensation Act? A. I knew I was working under the compensation all the time; I knew that. Q. You say you wrote three letters to Bates & Rogers at Mayfield, Ky.? A. Yes, sir. Q. How did you happen to write it Mayfield when you knew their plant was located at Maysville? A. I was taking Mayfield for Maysville all the time, that's the way I made the mistake; I thought it was Mayfield instead of Maysville. Q. What did you say in your letters to the Bates & Rogers Construction Co? A. Well, that has been a long time; I don't know whether I can think exactly or not what I wrote now. I don't hardly think I could. Q. Well about what you said? A. Well, I know this, I told them I was hurt there by being hit there with something in the eye and I lost my sight out of one eye, and I know I asked them if they couldn't help me a little. Q. Was that the tenor of what you said in all three of the letters? A. Yes, sir, just about the same. Q. Were these letters returned to you? A. Yes, sir. Q. What became of them? A. Well, in fact I never paid any mind to them; I couldn't say. Q. When did you first find out that you had made a mistake between Mayfield and Maysville? A. Well, I never found that out until I was talking to Mr. Leopold. Q. Did Mr. Lucas tell you? A. No, Mr. Lucas never did know. Mr. Lucas didn't know; he thought it was the same I did."

John Reed, who was a laborer with Allen, testified as follows: "Q. Were you up there with Henry Allen, the plaintiff in this case? A. I worked with him there, yes, sir. Q. Were you housed in the same bunk house with Henry Allen? A. Yes, sir. Q. Did you have occasion to observe him before the time he complained of an accident? A. Yes. Q. What was the apparent condition of his eye, his left eye, at that time? A. I didn't see anything wrong with it. Q. Was there any evidence of redness or inflammation? A. No. Q. Or being blood-shot or anything? A. No. Q. When was the first time you saw anything the matter with his eye—his left eye? A. Well, it was one evening that after our shift was out he complained of his eye, and same night he was up and complained with it. Q. You didn't see the acci-

dent? A. No. I didn't see it. Q. Well, now, did this eye apparently give him much or little trouble when you first saw it? A. Well, he complained of it—I couldn't say as to what pain he suffered or what seriousness happened to his eye, but he complained of it, that's all I know. Q. Do you know whether he was able to sleep that night or did he? A. Well, he was up at one time, on one night there in the shanty we stayed in. I don't know what pain he suffered with his eye. It seemed to be inflamed. Q. Do you remember why he was not sleeping? A. Well, he complained of his eye is what he told me. Q. Said his eye hurt so he was unable to sleep—is that what he said? A. Yes, said his eye hurt."

Dr. C. T. Wolfe, who was a member of the medical staff of the Louisville City Hospital, testified that Allen was admitted to the hospital in the latter part of November on account of an injury to his eye that had the appearance of having been made by a foreign body or a blow; that Allen told him that the injury to his eye was caused by a piece of metal that flew from a sledge or a piece of iron that was being struck with it by a co-laborer; that the eyesight was practically destroyed by the injury.

He further testified as follows: "Q. What was the condition of the eyeball? A. He had a lacerated wound, if I remember rightly, near the outer edge of what we call the cornea—that is the clear part of the eye. The tissues were torn and lacerated and it looked as though—I am sure something did strike him in the eye. Q. Did the symptoms you found correspond with the history of the case as given to you? A. Well, the history that he gave me was— Do you want me to tell you what he told me? Q. Yes. A. Told me he was working with metal and that he or one of his fellow workmen were using a sledge and his opinion a piece of the metal flew up as a result of the blow of the sledge and struck him in the eye. That's all I asked him—didn't care to know any more about it. Q. What is the present vision of the eye, do you know? A. He has perception to light—reduced merely to telling when the electric light is on. Q. Do you think unquestionably this cataract of this particular man is due to that injury? A. He had a lacerated wound and in what we call the danger zone and it was of such character as made me believe that the cataract, formation of the

cataract, was directly due to the blow. Q. That is your opinion now? A. That is my opinion, yes, sir."

This was all the evidence heard by the Compensation Board, and it made the following findings of fact: "1. The alleged accident to the plaintiff is proven to have occurred on the 18th or 19th of November, 1916, and the first notice of accident and injury which defendant received was mailed March 5th, 1917. This notice was not given as soon as practicable and was not a compliance with section 33. 2. The plaintiff failed to show the alleged 'Tom' to be an agent or representative of defendant. 3. The plaintiff failed to show that 'Tom' or the defendant had knowledge of the alleged injury. 4. Plaintiff's failure or delay in giving proper notice was not occasioned by mistake or other reasonable cause. 5. When plaintiff was alleged to have written his letters was too late under the circumstances to give the notice under the act. On these findings of fact the board found as a matter of law that Allen was not entitled to compensation and dismissed his claim.

As the case turns on the sufficiency of the notice to the employer of the injury it will be necessary to refer to pertinent sections of the Workmen's Compensation Law. It is provided in section 4914 of volume 3, Kentucky Statutes, that "No proceedings under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless a claim for compensation with respect to such injury shall have been made within one year after the date of the accident."

Section 4915 provides that "Such notice and such claim shall be in writing, and the notice shall contain the name and address of the employe and shall state in ordinary language the time, place of occurrence, nature and cause of the accident, with names of witnesses, the nature and extent of the injury sustained and the work or employment in which the employe was at the time engaged."

And in section 4917 it is provided that "Such notice shall not be held invalid or insufficient by reason of any inaccuracy in complying with section 4915 hereof unless it be shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be

shown that the employer, his agent or representative had knowledge of the injury or that such delay or failure to give notice was occasioned by mistake or other reasonable cause."

In section 4935 provision is made for a review of the findings of the Compensation Board by an appeal to the circuit court, but this power of review is limited to determining whether or not: "1. The board acted without or in excess of its powers. 2. The order, decision or award was procured by fraud. 3. The order, decision or award is not in conformity to the provisions of this act. 4. If findings of fact are in issue, whether such findings of fact support the order, decision or award."

At the very outset we are met with the contention of counsel for Bates & Rogers Construction Company that the findings of the Workmen's Compensation Board on the questions of fact are supported by sufficient evidence to sustain them, and of course if this contention is sound we are not at liberty to go back of the findings of fact made by the board for the purpose of determining their correctness. It would further necessarily follow from this that the ruling of the board that Allen was not entitled to compensation should be sustained because in its findings of fact the board held that the evidence did not show that "Tom" was the representative of the Bates & Rogers Construction Company, and besides did not have the "knowledge of the injury" required by the statute and that the delay of Allen in giving the statutory notice was not occasioned by "mistake or other reasonable cause."

We think, however, counsel misconceives the effect of the findings of fact made by the Compensation Board. The rule relied on by counsel as to the effect of the findings of fact by the board only applies when there is a disputed issue of fact and on the disputed facts the board makes a finding. If there is no issue of fact or if the facts are undisputed the question on the facts becomes one of law and the finding of the board is a finding of law and not of fact, although it may be styled a finding of fact by the board.

It is a familiar principle in our practice that when in the trial of a common law case before a jury there is no dispute as to the facts the question for decision is one of law to be made by the court and not by the jury, and we think the same rule should be applied in compen-

sation cases. *Hochspeier v. Industrial Board*, 278 Ill. 523, L. R. A. (1918 F. 227).

The question, therefore, being one of law and not of fact we do not find in the Compensation Act anything that precludes us from inquiring into the correctness of a finding of law made by the board. We think the right of the court to review it is authorized by that clause in section 4935 of the statute giving to the court authority to determine whether or not "(3) the order, decision or award is not in conformity with the provisions of this act." If Allen, on the undisputed facts, was entitled to compensation then the decision of the board was not in conformity with the provisions of the act, and so if the board where there is no dispute as to the facts should allow compensation the court could review its finding of law.

On the record it is conceded that there are only two questions in the case that need to be considered. One is whether the Bates & Rogers Construction Company had knowledge of the injury, and the other, if it did not, whether the failure or delay in giving the notice required by the statute was occasioned by "mistake or other reasonable cause."

The statute, in section 4914, provides, as we have seen, that "no proceeding under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof." It further provides, in section 4915, that "such claim shall be in writing." And it is contended upon the one side that the notice required by these provisions of the statute was not given, while on the other it is insisted that the rights of Allen were saved by section 4917 providing in part that "want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be shown that the employer, his agent or representative had knowledge of the injury."

It being conceded that the employer, Bates & Rogers Construction Company, did not have personal knowledge of the injury, the first question we may take up is—did its agent or representative have knowledge of the injury?

We think the evidence is sufficient to show that "Tom" was, within the meaning of the statute, the agent

or representative of the Bates & Rogers Construction Company, there being no contradiction upon this point of the evidence of Allen, who says that "Tom" was the man in charge of him, representing the Bates & Rogers Construction Company as their foreman, and a "foreman" or "boss" in charge of a crew or gang of men is an agent or representative of the employer and his knowledge of the injury has the same effect as if the employer in person had knowledge of it. *Fell's Case*, 226 Mass. 380; *Re Simmons* — Me. (1918), 103 Atl. 68; *Hornbrook-Price Co. v. Stewart* — Ind. App. (1918), 118 N. E. 315; *Joliet Motor Co. v. Industrial Board*, 280 Ill. 148; *R. F. Conway Co. v. Industrial Board*, 282 Ill. 313; *State Ex Rel. v. Pennington County*, 132 Minn. 251; *In Re Bloom*, 222 Mass. 434; *Pellett v. Industrial Commission*, 162 Wis. 596, 156 N. W. 956; *Parker Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976; *In Re Murphy* and *In Re American Mutual Liability Ins. Co.*, 226 Mass. 60, 115 N. E. 40.

But we do not think that "Tom," the foreman, had the "knowledge of the injury" that is required by the statute. According to the evidence of Allen he merely told the boss, who was present at the time of the accident, that "I got hit." "Well, I told him when I first got hit, I was hit in the eye with something." Knowledge by the foreman or employer that an accident has happened or knowledge that an employe has been hit with something as a result of the accident is not "knowledge of the injury." An employe might meet with an accident—he might get hit with something and the employer or his agent or representative might have actual knowledge of the fact that an accident had happened and that an employe got hit with something as a result thereof, but this would not convey to him the knowledge of the injury contemplated by the statute.

The purpose of the statute was that knowledge of the injury by the employer or his agent or representative should dispense with the necessity for giving the written notice required when the employer or his agent or representative did not have personal knowledge of the injury. If the written notice is given the statute provides that it shall state the "nature and extent of the injury sustained," although this does not mean that the full or exact nature or extent of the injury shall be brought to the knowledge of the employer, his agent or representa-

tive, but only that he should have such knowledge of its nature and extent as would enable him to take such steps as might be deemed prudent or advisable to provide the necessary medical or other attention that the nature or extent of the injury seemed to demand. We say this because it is provided in section 4917 that the written notice shall not be held invalid or insufficient by reason of any inaccuracy unless it be shown that the employer was in fact misled to his injury thereby.

We therefore think that the actual notice that may take the place of a written notice should be sufficient to convey to the employer the same knowledge of the injury that would be required if a written notice was given. Looking at the matter from this standpoint our opinion is that mere knowledge on the part of the employer that his employe has been hit with something or that an accident of some kind has happened is not "knowledge of the injury," within the meaning of the law. An employe might get hit and not sustain any injury or he might get hit and sustain an injury so trifling as that no medical or other attention would be needed or he might get hit and receive such an injury as that attention and treatment would be required. The notice is intended for the protection of the employer as well as the benefit of the employe, and it must be of such fullness and sufficiency as to apprise the employer of its nature and extent so that he may, for his own protection, as well as the benefit of the employe, do whatever seems necessary under the circumstances to save himself as well as he can from further loss or cost on account of the injury.

In *Bushnell v. Industrial Board of Illinois*, 276 Ill. 262, it appears from the opinion that "An employe was engaged in tearing up a floor. He was using a pick, one end of which he struck under the floor, and the floor was raised and torn up by placing his foot on the other end of the pick and giving the handle a pull. In some manner the pick slipped and he twisted his leg, sustaining an injury. The injury was apparently slight at first. No formal notice of the accident was given. Two conversations with the foreman were relied upon as dispensing with formal notice. On the following day the foreman noticed the employe limping and asked as to what was the matter. The employe replied that he had hurt his leg in tearing up the floor. Some days later the foreman again noticed that the employe was limping and

again asked him as to what was the trouble. On this occasion the employe stated that he had a 'game leg.' It was not claimed that in either of the conversations it was intimated that the injury was serious, or that the foreman had any knowledge of the facts or circumstances of such injury other than that obtained from these conversations," and the court said: "We think it is both the spirit and intention of the act that the employer shall have notice, either by formal notice or knowledge of such facts and circumstances of the accident as will apprise him that his employe has sustained injuries of such a character as to entitle him to compensation under the act, and that he may reasonably expect that such claim will be made . . . The mere fact that Stewart (the injured employe) told the foreman, in response to the question as to what caused him to limp, that he had wrenched his leg in attempting to tear up the floor, without making any claim for compensation for such injury or suffering any interruption of his work, was not sufficient notice of the facts and circumstances of the accident to entitle him to compensation under the provisions of section 24 of that act without the giving of any other notice."

The remaining question is—did Allen give to his employer notice of the accident and injury within the time and manner required by the statute, or if not, was his delay or failure to give the notice occasioned by mistake or other reasonable cause?

It will be observed that the statute, in section 4914, provides that "No proceeding under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof." And limits the time in which the notice may be given to one year after the date of the accident. And in section 4915 there is specified what the notice shall contain; and further it is provided, in section 4917, that the notice shall not be invalid or insufficient because of a failure to describe as required by section 4915 the time, place, nature and cause of the accident and the nature and extent of the injury unless it be shown "that the employer was in fact misled to his injury thereby;" and further provided that the giving of the notice will be excused if the delay or failure to give it was "occasioned by mistake or other reasonable cause."

Looking now to the facts, it is not contended that the letters written by Allen or the letter written by Robert H. Lucas did not sufficiently comply with the statutory requirement as to written notice, but insisted, first, that Allen did not give the notice "as soon as practicable" after the injury, and second, that his conduct in addressing the letters to Mayfield, Kentucky, in place of Maysville, Kentucky, was not "occasioned by mistake or other reasonable cause."

Allen received the injury for which he asked compensation in the latter part of November, 1916, and his first letter informing his employer of the accident and injury was written before Christmas, 1916, the second about Christmas and the third a few weeks after Christmas, while the letter of Lucas was written on January 30, 1917. Not receiving any answer to either of these letters, because they had been sent to the wrong address, Allen placed the matter in the hands of Mr. Leopold, who gave the Bates & Rogers Construction Company, on March 5, 1917, a sufficient notice, and in June, 1917, the matter was heard and disposed of by the board.

Allen, of course, knew the nature of his injury a few days after it was received and how it happened, and was fully advised of the extent of it when he left the hospital in December; and within a few days after leaving the hospital he attempted to give to his employer the notice required by the statute, but in place of sending this notice to Maysville, where his employer was located, he sent it to Mayfield. That Allen did attempt, in good faith, to give the notice was clearly established by the undisputed facts. Upon failing to receive an answer to his first letter he sent another and not getting an answer to this note yet another, to which he received no answer, and he put the matter in the hands of his attorney, Lucas, who also attempted in good faith to give the notice.

The words "as soon as practicable" should be given a liberal construction so as not to defeat, without just cause, the compensation to which a meritorious claimant is entitled, and when a claimant, acting in good faith, attempts to give the notice very shortly after he learns the nature and extent of his injury and within the year, he should not be denied compensation unless it appears that the employer "was in fact misled to his injury" by the failure to receive earlier notice, and there is no fact or

circumstance in this record conducing to show that the delay in giving the notice prejudiced in any manner the rights of the Bates & Rogers Construction Company.

Where a notice is not given "as soon as practicable," but the failure to give it "as soon as practicable" is caused by "mistake or other reasonable cause," this excuses the failure to give notice "as soon as practicable," and therefore in considering the question whether a notice was given "as soon as practicable," and an excuse is offered for this failure, it becomes important to inquire into the sufficiency of the excuse so that it may be determined whether or not the failure to give the notice "as soon as practicable" was occasioned by "mistake or other reasonable cause," and also whether the employer was prejudiced by the delay.

Where the employer is not prejudiced by the failure to give the notice at as early a date as it might have been or should have been given and where the failure to give it sooner was occasioned by an honest mistake on the part of the employe we do not think a fair consideration of the statute warrants the rejection of the employe's claim for compensation solely on account of the delay in giving notice. It is only important that the employer should have notice of the injury as soon as practicable in order that he may have opportunity to investigate the cause of the injury as well as the nature and extent of it and take such action as he may think advisable to protect his interest, and if it was made to appear that the employer's rights were prejudiced by the failure to give the notice at an earlier date than it was given it would require stronger evidence to support the excuse for the failure or delay in giving it than should be required when the delay did not occasion any injury to the employer or in any manner prejudice his interest.

But in this case there is, as we have said, no suggestion that the employer was prejudiced by the delay in giving the notice or that the injury to Allen's eye was aggravated by neglect or failure to receive proper medical attention. Dr. Wolfe testifies that the injury to his eye was of such a nature that the impairment of his eyesight was brought about immediately upon its happening.

Under the circumstances of this case we are of the opinion that the delay in giving the notice sooner was caused by mistake within the meaning of the statute, and that

a fair construction of the act did not warrant the rejection by the board of Allen's claim for compensation upon the ground of his delay in giving the notice.

The right to defeat it is rested entirely upon the legal ground that notice was not given as required by the statute. And where the claim is meritorious and the employer has not been prejudiced by the delay, the want of mistake or reasonable cause that would be sufficient to excuse the giving of the notice sooner should be very convincing to authorize the rejection of the claim.

The law was primarily intended for the protection and benefit of employes and its beneficent purpose should not be defeated by a strict or technical construction that would deprive the employe of the compensation to which he would clearly be entitled without contest if he had prosecuted his claim with diligence.

Illustrative cases on the disposition of the court to support this view are: *Donahue v. Sherman Sons Co.*, 39 R. I. 373, 98 Atl. Rep. 109; *Schmidt v. O. K. Baking Co.*, 90 Conn. 217; *Pellett v. Industrial Commission*, 162 Wis. 596; *Frankfort General Insurance Co. v. Milwaukee*, 164 Wis. 77, 159 N. W. 581; *Bloom's Case*, 222 Mass. 434; *Knoll v. Salina*, 98 Kan. 428; *A. Breslauer Co. v. Industrial Commission*, 167 Wis. 202, 167 N. W. 256; *Smith v. Solvay Process Co.*, 100 Kan. 40.

Wherefore, the judgment of the circuit court is affirmed.

Louisville & Nashville Railroad Company v. Vaughan's Administrator.

(Decided March 28, 1919.)

Appeal from Clark Circuit Court.

1. Railroads—Injuries to Persons on Tracks—Trespassers or Licensees.—Whether a person injured while on a railroad track is a trespasser or licensee must depend, not on the fact that the accident happened in a city, incorporated town, or at a public crossing, but upon the number of persons using the track at said point.
2. Railroads—Trespassers or Licensees.—Whether decedent was a licensee or trespasser held under the evidence a question for the jury.
3. Railroads—Warnings—Lookout.—The duty of a railroad company to give the necessary warnings, keep a lookout and have its trains

under reasonable control applies in the yards of the company, if the same are used by the public to such an extent as to constitute the person injured a licensee.

4. **Pleading—Striking Out Pleading.**—The court did not err in overruling the defendant's motion to strike from the petition, the allegations thereof not being objectionable.
5. **Railroads—Employees—Care Toward General Public.**—The care devolving upon railroad employees toward the general public is to be determined by principles of law and not by the rules of the company for the guidance of its employees.
6. **Appeal and Error—Objections to Rulings of Court—Waiver.**—Objections to the rulings of the court should be made during the progress of the trial and will be treated as waived unless proper exceptions are saved.
7. **Railroads—Signboards or Warnings—Pedestrians.**—The existence of signboards or warnings is not conclusive that a pedestrian is not licensed to use the way. A license to use the tracks may be acquired by use on the part of the public, regardless of such signboards.
8. **Trial—Argument of Counsel.**—Reasonable latitude should be accorded counsel in the closing argument to the jury, provided the argument be confined to facts shown by the evidence and reasonable deductions therefrom. Argument not supported by the record is improper.

BENJAMIN D. WARFIELD, SAMUEL M. WILSON and B. R. JOUETT for appellant.

HAYS & HAYS and R. C. MUSICK for appellee.

OPINION OF THE COURT BY JUDGE QUIN—Affirming.

This is an appeal from a judgment rendered in favor of the appellee, appellee's decedent having been killed in the appellant's yard at South Jackson, October 31, 1915. Many points are urged by counsel to reverse the judgment of the lower court, and we will discuss such of these as we deem material upon this hearing.

The company's yards are situated just south of the town of Jackson, and between Jackson, a city of approximately two or three thousand inhabitants, and Quicksand, a city of from one thousand to fifteen hundred inhabitants, the cities being about three miles apart. There are some mines in the immediate neighborhood, and bordering on both sides of the company's tracks, leaving Jackson, are several residences and a number of houses belonging to the railroad company.

Decedent, in company with three companions, while walking in the company's yards, was overtaken by an

engine that was backing from the depot southwardly to the roundhouse, and he and two of his companions were killed, the fourth being injured. There is a wagon road, also a plank walk, paralleling the company's tracks for a considerable distance southwardly from the town limits. It appears from the evidence that neither of these ways was much used by pedestrians or vehicles. At a point approximately 295 feet north of the scene of accident is a street crossing. The engine referred to had just a short time previously reached Jackson, had parked its coaches, and was proceeding southwardly to the round house, headlight facing north. The flagman of the train was on the rear of the tender and had a white lantern and a red lantern, but neither of these gave much light; he did not see the decedent in time to prevent the accident; he gave the signal for the engineer to stop at about the same time as an engineer on a passing train sounded the alarm. The engine was stopped but not until after it had run over the decedent.

It is urged by the appellant that its motion to strike from the petition and its demurrer to the petition should have been sustained, and also that it was entitled to a peremptory instruction, both theories being based on the fact that decedent was a trespasser and, therefore, the company was under no duty to exercise ordinary or any care to discover his presence on the track.

In the earlier cases it was held that the railroad company's duty to maintain a lookout, give warnings and have its trains under reasonable control was confined to cities, public crossings and thickly populated communities, and did not extend to rural communities or sparsely settled localities, though the track at these latter places may have been used by a large number of persons. *Shackelford v. L. & N. R. R. Co.*, 84 Ky. 43; *L. & N. R. R. Co. v. Vittitoe's Admr.*, 41 S. W. 269; *Miller's Admr. v. I. C. R. R. Co.*, 118 S. W. 348; *Davis v. C. & O. Ry. Co.*, 116 Ky. 144; *L. & N. R. R. Co. v. Redmon's Admx.*, 122 Ky. 384; *C. & O. v. Nipp's Admx.*, 125 Ky. 49; *C. N. O. & T. P. Ry. Co. v. Harrod's Admr.*, 132 Ky. 445; *Helton's Admr. v. C. & O. Ry. Co.*, 157 Ky. 380; *L. & N. R. R. Co. v. Schuster, by, &c.*, 10 Rep. 65; *Johnson v. L. & N. R. R. Co.*, 29 Rep. 36; *Brown's Admr. v. L. & N. R. R. Co.*, 97 Ky. 228; *L. & N. R. R. Co. v. Lowe*, 118 Ky. 260.

This rule has been modified so that now the question whether a party who is injured is a trespasser or licensee must depend, not on the fact that the accident happened in a city, incorporated town, or on a public crossing, but on the number of persons using the tracks at the place of the accident. *Shrader v. L. & N. R. R. Co.*, 114 S. W. 788; *L. & N. R. R. Co. v. McNary*, 128 Ky. 414; *C. & O. Ry. Co. v. Warnock's Admr.*, 150 Ky. 75; *Corder's Admr. v. C. N. O. & T. P. Ry. Co.*, et al., 155 Ky. 536; *C. N. O. & T. P. Ry. Co. v. Blankenship*, 157 Ky. 699; *C. & O. Ry. Co. v. Dawson's Admr.*, 159 Ky. 296; *Willis' Admx. v. L. & N. R. R. Co.*, 164 Ky. 124; *C. & O. Ry. Co. v. Isaacs*, 170 Ky. 190. Many other cases on both these propositions could be cited, but in view of the fact that the accident complained of happened in the company's yards we will direct our attention to a consideration of cases involving similar accidents, limiting the discussion to cases arising out of yard accidents. We will consider first the line of authorities relied upon by appellant, a few cases being used for illustration.

Kentucky Central R. R. Co. v. Gastineau's Admr., 83 Ky. 119. In this case decedent was treated as a trespasser, and there is nothing to show the extent of the use of the yards by the public, if any.

L. & N. R. R. Co. v. Bays' Admr., 142 Ky. 400. The court states there is no proof that the tracks were used by pedestrians to any considerable extent at the time of night the accident occurred.

Watson's Admr. v. C. & O. Ry. Co., 170 Ky. 254. In this case it appears that the right of way was enclosed with wire fences on each side, at what is termed the "Harrison street crossing," and a cattle guard extends across both tracks of the railroad, and is connected at the ends by wings, extending to the fence on each side of the right of way; nor were there any houses on either side of the right of way fronting thereon. The number of persons using the track at the point of accident is not given in the opinion, the court stating: "The enclosure of the right of way with fences and a cattle guard was all the railroad company could be expected to do to keep persons from using the tracks, and there was an entire absence of any necessity for traveling upon the tracks or any invitation to do so."

L. & N. R. R. Co. v. Redmon's Admx., 122 Ky. 385, is to the same effect, the tracks of the company being

enclosed by fences on each side, with a bridge at one end and a cattle guard at the other, the number of persons using the tracks not being disclosed.

McDermott, by, &c. v. Ky. Cent. R. R. Co., 93 Ky. 408. In this case the court says: "And, although there was some testimony showing that persons occasionally passed from Vine street along or upon the track to the depot, it does not appear such passway was then being regularly used, or ever was used by license of the company, express or implied." There was a sign in the vicinity of the place where appellant was injured, and he had several times been driven away—force being at one time used for that purpose.

Beginning with the case of I. C. R. R. Co. v. Murphy's Admr., 123 Ky. 787, and continuing through a long line of cases the court has consistently held in cases presenting facts similar to the one at bar it is a question for the jury whether, in the use of the company's tracks, at the point of accident, a person injured is to be treated as a licensee or trespasser. The accident in the Murphy case occurred in the company's switch yard in the town of Central City; the tracks had been used by the public for fifteen years or longer, as a roadway for foot passengers, with the knowledge of the operators of the trains. The court says: "The use is shown to have been so extensive, constant and continued as to raise a presumption of knowledge by the company that it was so used." We quote further from this opinion:

"If the railroad company knows that the public habitually uses its tracks and right of way in a populous community as a foot passway, so that it knows that any moment people may be expected to be found thereon, such knowledge is treated as equivalent to seeing them there, and their presence must be taken into consideration by the train operatives in the movement of their trains. Such foot passengers may be in law only trespassers or licensees. They may, indeed, have no legal right to be there or to use the track; but the question comes back, if they are there, and known to be there, what, then, is the company's duty as to running its trains? It is admitted that the company has the superior right—nay, maybe has the exclusive right—to the tracks, and that some way ought to be provided for keeping trespassers off them altogether. But the fact remains, the tracks are open, inviting for easy travel, are traveled

constantly, and so known to be by the company. The difference between the cases in the country and those in thickly settled towns and cities is one of practical materiality. In the country there are occasional sporadic uses of the tracks by the foot passengers, but they are comparatively rare. To compel the railroad trains to creep along under full control, in anticipation of what probably would not occur, viz., the meeting or overtaking of a stray trespasser, would not be reasonable, because most likely unnecessary. But in populous communities the probabilities are all the other way. The foot passengers, from long habit of use, which are known to and suffered by the company, may reasonably be expected at all times and in any number. It is more than a mere probability—it is a reasonable certainty—that they will be found there. The company should no more shut its eyes to such a probability within its knowledge, than to the actual fact of the presence when known. We will not say that to dash at uncontrollable speed through such a town, where people are known to be using the tracks for passing, is not negligence. Let the jury say whether it is."

In *I. C. R. R. Co. v. Holland's Admr.*, 147 Ky. 699, involving an accident that occurred in the Central City yards, the court holds that the case was properly submitted to the jury. To the same effect is *C. N. O. & T. P. Ry. Co. v. Harrigan's Admr.*, 149 Ky. 53.

Carter's Admr. v. C. & O. Ry. Co., 150 Ky. 525, is a case in many respects similar to the one at bar, and on the authority of this case alone we would be compelled to hold that the lower court properly submitted this case to the jury, the territory, the use and location of the yards, the physical facts and general surroundings being so nearly identical to those in the instant case. One Blevins lost his life in the yards of the railroad company immediately west of the town of Russell, in Greenup county. The county road paralleled the company's tracks at the point of accident. A very illuminating diagram will be found on page 526 of the reported case. The adjacent towns had a population somewhat smaller perhaps than Jackson and Quicksand. A wire fence separated the tracks from the county road; and, as in the present case, there was a base ball field near the point of accident. It was urged in the case under discussion that the accident having occurred in the company's private yards, which were not in a town or city, or intersect-

ed by a public crossing at the point of accident, the company did not owe the injured man the duty of lookout, etc. The court on this point said: "The fact that the accident did not occur in an incorporated city or town cannot, of itself, affect the case; it is the nature and use of the crossing by the public that is to determine the applicability of the rule which requires the lookout."

"If the use of the track by the public for crossing purposes was general, and acquiesced in by the railroad company, it was charged with notice of such use, and the trespasser became a licensee to whom the company owed a lookout duty, although the accident happened in the company's yard."

To avoid the application of the general rule as to liability for the accident it was contended in the Carter case, as well as this one, that among those using the track were employes of the company and hence there was no such use of the crossing by the general public as would bring the case within the rule. The daily use of from four hundred to five hundred people was shown in that case, while in the case at bar the testimony as to the use ranges from ten to five hundred persons daily. The court, in the Carter case, said: "The evidence does not show the use of the crossing was confined to the employes of the company; on the contrary, it tended to show that the crossing was so used by employes and the general public to the extent indicated," and the court was unwilling to say the crossing was not used by the general public to such an extent as to deprive Blevins of his right as a licensee.

Southern Ry. Co. v. Sanders, 145 Ky. 679, furnishes a splendid illustration of the point under discussion. In that case appellee recovered a verdict against the company because of injuries received in the company's yards; on appeal the case was reversed on the ground that the court was satisfied from the evidence the company was under no duty to anticipate the presence of persons on its track at the time and place the appellee was injured, the court saying: "It does not follow that because persons who in large numbers habitually use its tracks and right of way during certain hours of the day or during the entire day, are to be treated as licensees, that it will be used in the same manner during the night or that the company owes in the day and night the same

degree of care." In remanding the case for a new trial the court makes use of the following language: "If there is another trial, and evidence is introduced in behalf of appellee to show that large numbers of persons were habitually accustomed to using during the night the tracks and premises of the appellant company at the place where appellee was injured, the case should be permitted to go to the jury, as such use imposed upon the company the duty under the circumstances of this case of a lookout and giving warning of the movement of the engine. When the lookout duty is required it means such a lookout as will be effective for the purpose intended, and reasonably sufficient to discover the peril of persons on the track, as well as to stop the train or engine as soon as it can be done by the exercise of reasonable care when warning or notice of the danger is given. To meet this duty where it is required as to the backing engine in the night time there should be either a light on the end of the tender or a brakeman stationed there with a lantern, or a brakeman, with a lantern, walking in front of the moving engine. The fact that the engineer may be keeping a lookout is not sufficient when the way is not lighted so that he can see objects on the track. But, unless there is the quantity of evidence indicated upon the use of the tracks and premises by the public during the night or about the time appellee was injured the court should direct a verdict for the railway company."

On the second trial of this case there was a verdict for the plaintiff, from which an appeal was taken. Opinion on the second appeal is found in 154 Ky. 421, where, after referring to the evidence introduced as to the use of the company's yards and the cases on the subject, the court reaches the following conclusion: "So, in the case before us. The yards of appellant were open, and as they afforded a nearer and more direct route for the many persons passing between Woodford street and Court street, or from the north end of the station to Court street, it was but natural, and to be expected, that pedestrians would pass through them when and as it suited their convenience. The evidence shows that this use was continued until after train time, or as late as ten o'clock at night, thus bringing the case within the rule announced in the opinion upon the first appeal. The evidence was, therefore, sufficient to carry the case to the jury; and the jury being the judges of the weight to

be given the evidence, we cannot say, under all the circumstances, that their verdict is flagrantly against the weight of the evidence."

L. & N. R. R. Co. v. Taylor's Admr., 158 Ky. 633; L. & N. R. R. Co. v. Lowe, 118 Ky. 260. These two cases involve injuries to employees. Burton's Admr. v. C. N. O. & T. P. Ry. Co., 113 S. W. 442.

We will not extend this phase of the opinion any further than by reference to the case of Southern Ry. Co. in Ky. v. Jones, 172 Ky. 8, one of the latest cases on the subject from this court, and in which the court states that under the facts presented by the record a peremptory instruction was not proper. The appellee, Jones, was injured in the company's yards at Lawrenceburg, and in the course of the opinion the court says: "In a long line of cases we have held that such use of a railroad company's tracks as was here shown, imposes upon it the duty of operating its trains at a reasonable rate of speed, keeping a lookout and giving warning of the train's movements, and that this care is not only required at places where the public have a right to use the right of way and tracks, as at street crossings and the like, but is also to be applied at points on its road in cities, towns and populous communities, where the public generally have been in the habit of using, with the knowledge and consent of the company, its tracks and right of way."

In view of the foregoing we do not think the court erred in submitting the case to the jury.

Error of the court in overruling the defendant's motion to strike from the petition is urged as a ground for reversal.

The petition, with greater particularity than necessary, described the scene of the accident; that it occurred between Jackson and Quicksand; the tracks between said two places included the company's yards; and for ten years last past the inhabitants of Jackson and Quicksand and that vicinity had continuously and at all times, both day and night, used the switch yards and tracks between said two cities for public travel; the company had notice of such use by the public, and at or near the point of injury there is a public crossing travelled and used by the public across the switch yard; and also that the company had rules prohibiting the operation of its engines and tenders in the switch yard, where the

injury occurred, at a greater speed than four miles an hour.

We do not find anything prejudicial to the rights of appellant in overruling the motion to strike. The object of thus alleging the location of the company's yards, as between the two cities named, coupled with the allegation that the inhabitants thereof used the switch yard, was not objectionable. It apprised the company that there was such a use of the tracks at the point in question as to charge it with notice, necessary to bring appellee within that line of cases holding where the public had in great numbers used the tracks of the company this made it a question for the jury, as to whether the travel and use was sufficient to charge the company with giving to the persons using their track warning, lookout duty, and having their trains under reasonable control. While it is true the accident did not happen within the limits of an incorporated city it was so close thereto and the community was so populated, and the tracks, according to the testimony, were used by that number of persons, as would make this a case for the jury.

The allegation as to the rules of the company prohibiting the operation of its engines at a greater rate of speed than four miles an hour was not proper, and should have been stricken on defendant's motion. As said in *L. & N. R. R. Co. v. Dyer*, 152 Ky. 264: "The court has committed itself to the doctrine that the care the railroad employes must exercise towards the general public is to be determined by the principles of law and not by the rules adopted by the company for the guidance of employes." The rules of the company are not, therefore, admissible for the purpose of showing either proper care or negligence on the part of the company's employes. See also *Louisville Ry. Co. v. Gaugh*, 133 Ky. 467; *Southern Ry. Co. v. Stewart*, 141 Ky. 270.

But notwithstanding the fact the court overruled the motion it does not appear from the record defendant was in any wise prejudiced thereby. It was sought to prove this rule by the witness Stivers, whose deposition was taken, and to each of the questions pertaining to the rules there is an objection noted and the question certified to the court for decision, and the court's ruling on these objections does not appear, but even though it did the witness states that he did not know what the rule was

regarding the speed of engines in the Jackson yard at the present time, that is, at the time of the accident.

Further points covered by the motion to strike were based on the theory that decedent was a trespasser, and in view of the conclusion we have reached as to the status of the decedent at the time of the accident we do not think it necessary to discuss these points, except that in answer to the contention that there is no allegation as to the amount of the use, we may say we think the allegations of the petition ample to cover this point.

Complaint is also made of the action of the lower court in its admonition or statement to the jury, which had had the case under consideration for two days and announced to the court that they could not agree, and it is alleged in the additional grounds for a new trial that the court thus addressed the jury: "Take the papers and return to the jury room and make a verdict, as some jury will have to make a verdict in the case. This court does not adjourn until Saturday, December 23rd." No objection or exception was made or taken by the defendant at the time, nor was this urged or mentioned in the original motion and grounds for a new trial, and though the verdict was rendered and the judgment entered December 20, 1916, the first intimation that the court had of this complaint was April 24, 1917, when defendant tendered its additional grounds for a new trial.

There is a conflict in the decision as to whether it is error for the trial court to threaten to keep the jury a given length of time, unless agreement is sooner reached. But we cannot go into a discussion of this matter, because the defendant did not object or except to this statement or admonition of the court. Rulings of the trial court if not excepted to in that court will be deemed to have been waived. Civ. Code, secs. 333 and 334; Edelen's Pleadings, etc., sec. 334, and notes; *Reece v. West*, 145 Ky. 331; *Employers' Liability Assurance Corporation v. Stanley Deposit Bank*, 140 Ky. 735.

The point is mentioned but not seriously urged that there were certain signboards or warnings at either end of the company's yards, but there is no evidence that decedent either knew of the presence of said signboards or passed either of them the night he was killed. The question of the effect of these boards is thus discussed in *Southern Ry. Co. v. Jones*, 172 Ky., pp. 12, 13:

"In view of the abundant evidence as to the long and constant use by the public of appellant's tracks at the place of the accident, we would be unauthorized to say that the mere presence on or near the grounds of signboards forbidding the use of the premises by the public, even though they had been maintained for a greater time than appellant's evidence tended to prove, they were here maintained, would have justified the giving of the peremptory instruction asked by it."

It was evidenced in that case that the signboards had not been up a very long time, and the court thus further states: "And in the absence of evidence tending to show that before receiving his injuries he saw or had been informed of the presence of the signboards, it will not be presumed that a person of ordinary intelligence, situated as he was, must have seen them," The court cites with approval the text found in 33 Cyc. 761 as follows:

"As a general rule, pedestrians who use a railroad track as a thoroughfare, despite posted notices and other warnings forbidding it, are trespassers. The existence of the signboard or warning, however, is not conclusive that a person had no license to use the way; and a license to use the tracks may be acquired by customary use, despite such signboards or warnings."

The facts bring this case within the rule mentioned in the foregoing citations.

Complaint is made of the instructions given and refused. As to the instructions given, they are almost a literal copy of the instructions directed to be given upon the retrial of *L. & N. R. R. Co. v. McNary*, 128 Ky. 408, and these instructions have been approved in later cases.

As to the instructions tendered by the defendant it is sufficient to say the facts in the *McNary* case, *supra*, are so similar in many details to those in the instant case, that the instructions written out by the court were intended to cover the whole law of that case. For example, appellant argues there was evidence that decedent and his companions did not get on the main track until about the time the flagman first saw them, and when the engine was only 15 or 20 feet away. In the *McNary* case the court thus states: "She had on a bonnet and just when she got on the track she was struck and killed by a fast passenger train coming from the south, and running 40 or 50 miles an hour."

In our opinion the instructions given by the lower court embrace the theories of both the plaintiff and defendant. One of the points urged for reversal is that the verdict is not sustained by sufficient evidence, but this ground is without merit. We think there was ample evidence to sustain the verdict.

The last point urged is misconduct of counsel in his closing argument to the jury, it being alleged counsel stated, in effect, that ordinary care would require the defendant to have had a headlight on the rear of the engine or tender, as it was backing in defendant's yard. The point seems to be made on the theory maintained throughout counsels' brief, that decedent was a trespasser and, therefore, not entitled to a headlight or any light, and we do not think the argument was improper; certainly not prejudicial to the defendant. Reasonable latitude should be accorded counsel in the closing argument to the jury, provided the argument be confined to facts shown by the evidence and reasonable deductions therefrom. Argument not supported by the record is improper.

On the whole case, for the reasons hereinbefore stated, finding no error in the judgment appealed from the same is affirmed.

Dunn v. Dunn.

(Decided April 17, 1919.)

Appeal from Clark Circuit Court.

1. **Divorce—Restoration of Property.**—Where one spouse obtained property from the other during marriage and by reason thereof, it should be restored to the one from whom it was obtained on a decree of divorce.
2. **Divorce—Restoration of Property.**—Property deeded by the husband to the wife without consideration during marriage, and money furnished by him to her with which to purchase property are presumed to have been obtained through and by reason of the marriage relation and should be restored by a judgment divorcing the parties.

R. H. TOMLINSON for appellant.

BENTON & DAVIS for appellee.

OPINION OF THE COURT BY JUDGE SAMPSON—Affirming.

Appellant, Lena C. Dunn, and appellee, James H. Dunn, were married in 1898, and lived together most all the time up to 1915, when Lena abandoned her husband. At the time of their marriage James H. Dunn owned a considerable farm in Garrard county, worth \$8,000.00 or \$9,000.00, and he had some personal property, all of which he inherited from his ancestors. Mrs. Dunn had nothing at the time of her marriage, but afterwards received something like \$100.00 from the estate of her father. Immediately after their marriage they moved on to the farm and lived there for a short while. In 1903 a part of the farm was sold and another farm purchased. In 1906 James H. Dunn bought from Harris a house and lot on Richmond street, in Lancaster, for which he paid \$1,600.00, and a deed was made to James H. Dunn. On the 14th of September, 1918, this property was conveyed by appellee to appellant in consideration of some matter which grew out of the marriage relation. In 1905 appellee purchased of Jenny F. Arnold and others a parcel of land in Lancaster for which he paid \$2,300.00, and this was deeded to appellant, Lena C. Dunn. In 1906 this property and a lot which appellee had conveyed to appellant were sold for \$3,100.00. Finally a house and lot were acquired in Burgin, Kentucky, worth about \$2,000.00, and one in Winchester, Kentucky, worth about \$3,000.00, but the legal title to the Burgin property was in the appellant, Lena C. Dunn, and a life estate in the Winchester property was also in her. Money derived from the sale of the lands which appellee, James H. Dunn, inherited from his forebears was used to pay for these two pieces of property. No part of the consideration, so far as this record discloses, was provided by Lena C. Dunn, except as she obtained funds from her husband. She does not show where she earned or acquired any money or property, except from her husband, and the \$100.00 which she received from the estate of her parents, and this \$100.00 was used by her for personal expenses.

This suit was instituted on the 28th of September, 1917, in the Clark circuit court, by Lena C. Dunn against her husband, James H. Dunn, for divorce, the custody of their only son, James H., Jr., for maintenance during the pendency of the action and for alimony upon the

ground that appellee Dunn, without like fault on the part of appellant, had habitually behaved towards her for not less than six months in such cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness. The answer traversed the grounds of divorce alleged in the petition, and as counterclaim alleged that the plaintiff abandoned him in February, 1915, and had since refused to and had not lived with him. Further pleading the answer averred that appellee held the title to the house and lot in Winchester, worth \$3,000.00, and a house and lot in Burgin, Ky., worth \$1,800.00, which had been purchased and paid for with money belonging to appellee, and that appellant obtained title to both the said pieces of property from appellee during their marriage in consideration of and by reason of the fact that the plaintiff was his wife, and he asked that said property be restored to him. The grounds of divorce alleged in the counterclaim were traversed by reply. Quite a bit of evidence was taken upon the issues as joined, but on December 20, 1916, appellee tendered and offered to file an amended answer and counterclaim, to which motion appellant objected. The motion was supported by an affidavit which is in part as follows:

"The affiant, James H. Dunn, says that since this cause was submitted, in fact on the 16th day of December, 1916, he learned for the first time that the plaintiff was unfaithful and untrue to him while she was living with him as his wife, and that while they were living together in Winchester, Kentucky, the plaintiff would, under the pretense of visiting her sister, Mrs. Clyde Pullins, go to Richmond, Ky., and while there would be guilty of adultery with men, to-wit: (naming them), and perhaps others whose names are unknown to this affiant."

He asks to be permitted to take additional proof upon the amended answer and counterclaim tendered. The court, after due hearing, allowed the amended answer and counterclaim to be filed, and the case continued for further preparation.

Upon final hearing the court dismissed appellant's petition and granted divorce to appellee, James H. Dunn, on his counterclaim, and adjudged "the property mentioned in the pleadings and evidence in this case, the title to which is in the name of the plaintiff, Lena C. Dunn, was obtained by her from the defendant, James H. Dunn, during their marriage and in consideration thereof, and

it is adjudged that said property be, and it is, hereby restored to the defendant, James H. Dunn."

The care and custody of the infant son, James H. Dunn, Jr., was committed to the plaintiff, Lena C. Dunn, with the right to defendant to see and visit his son at reasonable times. Provision was also made for the maintenance of the son out of the property of James H. Dunn; an attorney fee of \$50.00 was adjudged to counsel for appellant to be paid by appellee, and a fee of \$20.00 to the county attorney, and appellee was adjudged to pay all the cost. From this judgment Lena C. Dunn appeals, not to reverse the judgment of divorce, but that part of the judgment which restores the real property to James H. Dunn.

"Every judgment for a divorce from the bonds of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing." Civil Code, sec. 425.

This section of the Civil Code has been construed and applied in the following cases: Phillips v. Phillips, 173 Ky. 608; Golding v. Golding, 82 Ky. 51; Fields v. Walker, et al., 174 Ky. 461; Pruett v. Pruett, 178 Ky. 802.

There is little or no doubt that the property in question came directly through and from the means of appellee, James H. Dunn, and that appellant, Lena C. Dunn, provided no part of it. It also satisfactorily appears that she obtained title to the property in controversy from and through her husband "during marriage, in consideration or by reason thereof," and without a valuable or any consideration. By the provision of the section of Civil Code, *supra*, such conveyance is "deemed to have been obtained by reason of the marriage." The wife seems to have been a much better financier than her husband, because she managed and acquired all his property. Her counsel argues that but for her frugality and adroitness appellee's estate would have been dissipated because he

was of a roving disposition and improvident. This may be true, but since the property was acquired by money which came indirectly, if not directly, from the estate inherited by him, under the express provision of the Code it must be restored to him upon the granting of divorce.

As there is no substantial error in the judgment it must be, and is, affirmed.

Ward v. Preston, et al.

(Decided April 17, 1919.)

Appeal from Johnson Circuit Court.

Mortgages—Validity—Want of Consideration—Fraud—Finding—Evidence—Sufficiency.—In an action to enforce a mortgage lien, evidence examined and held insufficient to show want of consideration or to sustain a finding that the mortgage was obtained by fraud.

FOGG & KIRK for appellant.

J. K. WELLS and J. W. WHEELER for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

On July 31, 1912, Sanford Preston and his wife, Mary Ellen Preston, executed and delivered to S. W. Ward a mortgage on 75 acres of land located on Buffalo creek, in Johnson county, to secure the payment of a note for \$400.00, payable one year from date. About a month after the maturity of the note, this suit was brought by Ward against Preston and wife to enforce the mortgage lien. The defendants pleaded in substance that there was no consideration for the mortgage, and that its execution was procured by the fraud of plaintiff and his brother, Jeff Ward. On final hearing, the chancellor sustained the plea of fraud and entered judgment cancelling the mortgage and dismissing the petition. Plaintiff prays an appeal.

According to the evidence for plaintiff, Jeff Ward, who was the son-in-law of Sanford Preston, approached plaintiff for the purpose of procuring a loan of \$400.00,

to be used for the purpose of buying cattle. He and Jeff Ward then repaired to the home of Sanford Preston, who agreed to execute a mortgage to secure the loan. Upon the execution of the note and mortgage, Preston and Jeff Ward went to the home of plaintiff, who delivered to Preston and Jeff Ward a mare, nine head of young cattle, two cows and a calf, a sow and three pigs, and \$35.00 in money, aggregating \$400.00. Preston rode the mare away and drove the cattle home that day. The next morning he returned and got the hogs. The cattle and other stock were taken to Preston's home where they remained for a few weeks, when they were sold to John Butcher, who paid the purchase price to Jeff Ward. Plaintiff never told the defendant that he didn't have the \$400.00 with him but would get it when he sold some sheep, but the consideration for the mortgage was the stock. Jeff Ward corroborates plaintiff and claims to have paid Preston his part of the proceeds of the stock. Other witnesses, who were present, claim to have seen Preston driving the stock away. Ashley Ward testified that Preston told him he had mortgaged his farm to plaintiff, and that he and his son-in-law, Jeff Ward, were going to get some money and trade in cattle. This witness also stated that he had sold Preston a bunch of cattle himself. Milton Music says that when Preston came to drive away the hogs, he stated to him that he had mortgaged his farm and thought he would come out all right. Ed Vanhoose, a justice of the peace, testified that Preston had told him that he and his son-in-law, Jeff Ward, were partners trading in cattle.

According to Preston's testimony, he executed the mortgage for the purpose of getting \$400.00 to go in partnership in the cattle business with his son. Upon the execution of the mortgage, S. W. Ward jumped up and said he didn't have the money. He further said that he had a drove of sheep over at John Trimble's, and as soon as he could take the sheep off, he would bring the \$400.00 back to Preston. Thereupon Preston demanded the return of the mortgage but plaintiff refused to give it back to him. Preston further claims that the cattle and other stock were bought by Jeff Ward, and that he went to S. W. Ward's home merely to assist Jeff in driving the cattle home. He also says that he never received any of the proceeds of the stock. Mrs. Preston testified to the same facts, but admitted on cross-examination that she and her

husband were to have an interest in the profits of the stock. Will Preston testified that S. W. Ward and Jeff Ward came to his father's farm and said they had money to loan him but that the money was not paid when the mortgage was executed. On the contrary, S. W. Ward told his father that he had a drove of sheep and as soon as he sold them he would bring him the money. Linnie Preston, William Preston's wife, also testified to the same facts.

In rebuttal, S. W. Ward and Jeff Ward denied that upon the execution of the mortgage S. W. Ward said he didn't have the money and would bring it to Preston as soon as he disposed of the drove of sheep, or that the mortgage was obtained by fraud.

With respect to what occurred when the mortgage was executed, it is apparent that the evidence is about equipoignant, but viewing the case in the light of the subsequent developments, it seems to us that the evidence is wholly insufficient to sustain the claim of fraud or lack of consideration. Indeed, the charge that S. W. Ward conspired with Jeff Ward to procure the execution of the mortgage is based entirely on suspicion. As a matter of fact, S. W. Ward delivered to Preston \$400.00 worth of livestock, and Preston himself helped to drive the stock to his home. Not only so, but Preston admitted to three disinterested witnesses that he had mortgaged his home for the purpose of getting the money to trade in cattle, and that he and his son-in-law were partners in that business. Furthermore, Mrs. Preston testified that she and her husband were to share the profits on the stock. It is therefore manifest that Preston's claim that the mortgage was executed for money and that S. W. Ward failed to deliver it to him is clearly opposed to his own conduct and admission. While it may be true that his son-in-law, Jeff Ward, disposed of the stock without paying Preston his portion of the proceeds, S. W. Ward, who parted with his stock upon the faith of the mortgage, cannot be held responsible for any default upon the part of Jeff Ward. We therefore conclude that the judgment cancelling the mortgage and dismissing the petition was erroneous, and that the mortgage lien should have been enforced.

Judgment reversed and cause remanded with directions to enter judgment in conformity with this opinion.

Thompson v. Porter, et al.

(Decided April 18, 1919.)

Appeal from Fayette Circuit Court.

1. **Judgment—Court of Continuous Sessions—Power Over Judgments.**—A circuit court of continuous sessions has the same power over its judgments, in actions at law, for sixty days after their rendition, as other circuit courts have over their judgments during the term, at which they are rendered.
2. **Judgment—Court of Continuous Sessions—Power to Vacate or Modify Judgment.**—A circuit court, of continuous sessions, after sixty days have elapsed from the rendition of a final judgment, has no power to set aside, modify or vacate its judgments, except upon the same character of proceedings and for the same reasons, that other circuit courts are authorized to disturb their judgments, after the term had ended, at which they were rendered.
3. **Judgment—Vacation of Judgment.**—If a judgment is void, the court, which rendered it, may vacate it, upon motion, after the term, at which it was rendered.
4. **Judgment—Default Judgment.**—Where a court has jurisdiction of the parties to an action, and the subject matter of the action, and the parties are free from disabilities, a default judgment regularly rendered, which is within the pleadings and prayer of the petition, is not void.

J. A. EDGE for appellant.

JAMES A. WILMORE and J. KEEN DANGERFIELD for appellees.

OPINION OF THE COURT BY JUDGE HURT—Reversing.

On January 15, 1916, the appellant, L. E. Thompson, instituted a suit in the circuit court, for the county of Fayette, which is a court of continuous sessions, against the appellees, Harvey and Diana Porter, to recover the possession, from them, of a certain house and lot, in the city of Lexington, which she alleged that the appellees were wrongfully withholding from her. It was averred in the petition by appellant, that she was the owner, by a fee simple title of the lands, and entitled to their immediate possession. The appellees were duly served with a summons to appear and defend the action, but failed to do so, and on the 23rd day of February, 1916, a judgment was rendered in the action, by default, and by which it was adjudged, that the appellant was

the owner of the lands, with a fee simple title, and entitled to recover their possession from appellees, and adjudged, that she recover their possession and her costs, and that a writ of possession for the lands issue upon the judgment, in behalf of appellant. No step nor proceeding of any kind touching the judgment was undertaken by the appellees, at any time, until the 6th day of July, 1916, when they moved the court to vacate the judgment upon the ground, that it was void. The motion was sustained on the 4th day of November, 1916, at which time the court adjudged, that the judgment of February 23rd, 1916, for the recovery of the lands, be vacated, and from this judgment, the appellant has appealed.

The Fayette circuit court, being one of continuous sessions, the time within which it has control over its judgments, in actions, at law, such as judgments in actions of ejectment, is governed by the provisions of sections 988, and 998 Ky. Stats., the first of which provides, as follows: "The court shall have control over its judgments for sixty days, as circuit courts have over their judgments during the term, in which they are rendered." The latter section provides, as follows:

"Proceedings to vacate or modify a final order for grounds for which, in courts having terms it might be vacated after the term, at which it was rendered, may be had in reference to any order or judgment of the court, after expiration of sixty days from its rendition. A motion to vacate a judgment because of its rendition before the action could regularly be placed upon the trial docket, shall only be entered within three months after its rendition."

Hence, it would seem, that courts of continuous sessions have only such control over their judgments, in actions at law, for sixty days after their rendition, as circuit courts, having terms, have over their judgments during the term at which their judgments are rendered, and after the expiration of sixty days from the rendition of a judgment, in a court of continuous sessions, the judgment may be vacated or modified, only in the same way and upon the same grounds, as one upon which a judgment in a court, having terms, may be vacated or modified, after the term, at which it was rendered. Sixty days following the rendition of a judgment in a court of continuous sessions, are with reference to the power of

the court, over the judgment, considered as a term of such court.

In *Henry Vogt Machine Co. v. Pennsylvania Iron Works Co.*, 23 K. L. R. 2163, touching the construction to be placed upon the provisions of section 988, *supra*, and its application, when sixty days had elapsed, after the rendition of a judgment, in a court of continuous sessions, this court said:

"The court had therefore lost control over the judgment and was without power to modify or set it aside, except as provided under sections 518 and 520 of the Civil Code of Practice, regulating proceedings for this purpose after the term, at which a judgment is rendered." This construction has been adhered to in many cases. *Trapp v. Aldrich*, 23 K. L. R. 2430; *Williams v. Williams*, 107 Ky. 496; *Roemele v. Schmidt*, 138 Ky. 336; *Accident Co., etc. v. Reigart*, 92 Ky. 142; *Louisville v. Muldoon*, 19 K. L. R. 1386; *Johnson v. Stivers*, 95 Ky. 128; *Fritsh v. Covington*, 161 Ky. 171; *Petty v. Wilbur Stock Food Co.*, 128 Ky. 130. The rule of the common law, and which has been adhered to, in this state, when applied to judgments of the circuit courts, is, that a final judgment, can not be vacated or modified, by the court, which rendered it, after the term, at which it was rendered, except upon such grounds, and in the manner prescribed by the Civil Code. *McManama v. Garnett*, 3 Met. 517; *Davis v. Jenkins*, 93 Ky. 353, 15 R. C. L. 691; *Hocker v. Gentry*, 3 Met. 463; *Wise v. Wolfe*, 27 K. L. R. 610; *Megowan v. Pennebaker*, 3 Met. 455; *Thompson v. Brownlie*, 25 K. L. R. 622. The appellees were persons *sui juris*, and neither of them laboring under any disability, except coverture, and having been actually served with summons, in the county wherein they resided, and in which the court sat, and hence were confined in their attempts to procure the vacation of the judgment to the grounds prescribed by sections 340, 518, and 763, of the Civil Code, or to such of the grounds mentioned in those sections, as apply to persons authorized to sue and be sued, in their own proper persons, and not constructively summoned, and to the character of proceedings, and to be instituted within the time provided by sections 344, 519 and 520, and 763 Civil Code. After sixty days had elapsed from the rendition of the judgment, a vacation of the judgment could be granted upon a motion, in the court, which rendered it, upon only

two of the grounds mentioned in those sections of the Code. These grounds are a clerical misprision or because the judgment was void. To obtain a vacation of the judgment upon the other grounds open to them, it was necessary to proceed by a petition as in any other action. Sections 344, 520, Civil Code. That the entry of the judgment was not a clerical misprision is apparent. Hence, the only ground, upon which the court, at the time, it did so, was authorized to vacate the judgment, was upon the ground, that it was void, and, for that reason, a nullity. After the term, at which they are rendered, default judgments can be vacated, only, by the same methods and upon the same grounds, applicable to the vacation of other judgments. The judgment, if valid, rendered the questions of the title and right of possession *res judicata*, between the appellant and appellees, so long as the judgment was not reversed, vacated nor modified, in the way and upon some of the grounds provided by law. Then to determine the soundness of the court's action in vacating the judgment, it only remains to determine, whether or not the judgment was void. If void, the court was clearly within its authority, in setting it aside, upon motion, as it did do, but, if not void, the action of the court was not authorized. The fact, that appellees had a good defense, which they might have successfully urged, against the recovery of the judgment by appellant, if they had seen fit to offer it, does not render the judgment void, as it was within their rights to confess the claims of appellant, if they chose to do so. Neither does the fact, that appellees by pursuing the method and upon one or more of the grounds prescribed by the Civil Code, be able to secure a vacation of the judgment, and be permitted to interpose a defense to the action, render the judgment void. The court had jurisdiction of the parties to the action. The appellees were regularly served with a summons to appear and defend the action, and for the requisite time, before the judgment was rendered. They resided in the county where the court sat. They labored under no disabilities, except coverture on the part of one of them, which is not a disability as to suing or being sued. The land, in controversy, was situated in the county, where the court sat, and its jurisdiction extended to every question relating to title and possession of it, which could have arisen between the parties. The judgment was within the alle-

gations and prayer of the petition, and described the parties, and the lands recovered, and the issues determined between the parties. Such a judgment is not void, and the court was in error to vacate it upon such ground, and was without power to set it aside upon a motion, after sixty days had elapsed from its rendition, because of any reason, other than its being void. The judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

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- right to recover, need only object and except to its being given, and is under no duty to suggest by an offered instruction a necessary element of plaintiff's right of recovery, omitted from such an instruction. *L. & N. R. Co. v. Wright; Same v. Barr* 634
45. Instructions.—An instruction which omits a necessary element of a party's theory of the case can not be said as to his adversary to be correct as far as it goes or in any sense, nor does the rule apply to the adverse party that if an instruction is correct as far as it goes any omission not suggested by offered instruction is waived. *Id.* 634
46. Finding of Chancellor.—Where the evidence is conflicting and the mind is left in doubt as to the truth of the matter, this court will give weight to the finding of the chancellor and adopt it. *Franz v. Jacobs* 647
47. Finding of Chancellor.—In an equity case, where the proof is conflicting and upon the whole case the mind is left in doubt as to the truth of the matter, the chancellor's judgment will not be disturbed on appeal. But in this case, where plaintiff seeks a cancellation of the deed upon the ground that he was an infant at the time it was executed, and the preponderance of the testimony shows that he was twenty-one years of age at that time, the judgment of the chancellor so holding will be upheld. *Adkins v. Adkins* 662
48. Upon What Decisions Are Based.—Decisions of this court are based upon the records filed and not upon affidavits filed with briefs of counsel. *Cummins v. Mullins* 666
49. Trespass—Evidence.—In an action in trespass to recover for timber taken, injury to growing timber and damage to land by reason of roads made thereon, the trespass being admitted, the only questions are value of the timber taken, damage to the growing timber and land by reason of the roads, and when this question is properly submitted to a jury, its verdict will not be disturbed unless palpably against the weight of the evidence. *A. R. Humble Stave & Lumber Company v. Dunbar*.... 635
50. Equitable Actions—Reversal.—Ordinarily an equitable action will, on appeal, be finally disposed of by the appellate court and, if the judgment is reversed, remanded with direction to the lower court to enter such final judgment as will conform to the opinion of the appellate court. But where, as here appears, the case was prematurely tried in the court below, with respect of which the parties were equally at fault, and on the appeal the confused state of the record renders it practically impossible for the appellate court to intelligently determine the rights of the parties, that court, to prevent injustice to any of them, will reverse the judgment and remand

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- the case for the necessary preparation and another trial in the circuit court. *O'Bryan v. O'Bryan* 766
51. Records—Presumptions.—This court will conclusively presume, after submission, that a record brought here on schedule filed in the lower court, as prescribed by the Code of Practice, is a complete record. *Bryant v. Hamblin; Sutton v. Bryant and Hamblin* 716
52. When Right to Prosecute Appeal Will Cease—Options.—Where the appellant elects to avail himself of one of two options given him by a judgment to which he excepts and from which he appeals, and the exercise of either option deprives him of a part of the money or property for which he sued, the taking by him of either option does not end or obstruct his right to take or further prosecute the appeal. It is only where he has compromised and settled the demand sued for or matter in controversy with the appellee in satisfaction of the judgment so as to free the parties from its coercive provisions; or where, pending the appeal, conditions have arisen that would make the judgment of the appellate court of no legal effect, that the right to further prosecute the appeal will cease. *Clay's Committee v. Washington, etc.* 756
53. Weight of the Evidence.—Whenever an examination of the record discloses the fact that the verdict is clearly and palpably against the weight of the evidence it is not only the right but the duty of the court to reverse and remand for a new trial. *L. & N. R. Co. v. Baker's Admr.* 795
54. Objections to Rulings of Court—Waiver.—Objections to the rulings of the court should be made during the progress of the trial and will be treated as waived unless proper exceptions are saved. *L. & N. R. Co. v. Vaughan's Admr.* 829
55. Workmen's Compensation Act—Findings of Fact by Board—When Conclusive.—The rule as to the conclusiveness of findings of fact only apply when there is a disputed issue of fact and on the facts the board makes a finding. *Bates & Rogers Construction Co. and Workmen's Compensation Board of Ky. v. Allen* 815
56. Workmen's Compensation Act.—Where Facts Are not Disputed the Question is One of Law—Review by Courts.—If there is no issue of fact or if the facts are undisputed the question becomes one of law and the finding of the board is one of law and not of fact, and the right of the court to review it is authorized by that provision of the law allowing review when the order, decision or award is not in conformity with the act. *Id.* 815

APPLIANCES—See Master and Servant.

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APPRAISEMENT—See Judicial Sales.

ARBITRATION AND AWARD—See Estoppel.

ARGUMENT OF COUNSEL—See Trial.

ARREST—See Municipal Corporations—

1. When Officer May Arrest Without Warrant.—Where one reports to an officer that another had just attempted to rob him, and gives a plausible and consistent account of the attempt, and there is nothing in the nature of the account to cause a reasonable person to question its accuracy, and soon thereafter the same person points out to the officer the one whom he claims attempted to rob him, the officer will be deemed to have reasonable grounds to believe that the one pointed out is guilty of a felony, and may arrest him without warrant. *Grau v. Forge* 521
2. Force That May Be Used to Retain Custody of Prisoner.—An officer having a prisoner in charge whom he has lawfully arrested may use such force as is reasonably necessary to retain the custody of the prisoner, and may use such force as is necessary, or appears to him in the exercise of a reasonable discretion to be necessary, to defend himself from the dangers of an assault and battery committed upon him by the prisoner, but he must use no more force than above outlined in the defense of himself. *Id.* 521
3. Assault of Prisoner by Officer—Evidence.—Evidence examined and held that the officer was not authorized to assault the prisoner in his charge, either upon the ground that it was necessary to retain his custody, or to defend the officer from an assault committed by the prisoner. *Id.* 521

ASSAULT AND BATTERY—See Arrest; Carriers; Damages—

Self-defense—Evidence—Sufficiency.—In an action for assault and battery, evidence examined and held to make the question of self-defense one for the jury. *Schroeder v. Coppin*.... 61

ASSESSMENT—See Taxation.

ASSIGNMENTS—See Actions; Bills and Notes; Fraudulent Conveyances; Municipal Corporations; Taxation—

1. Action by Assignee—Necessary Parties—Assignor.—The assignee of non-negotiable merchandise coupon books, issued by a mining company to its employes, cannot recover thereon without joining his assignors as parties plaintiff or defendant. *Ashless Coal Co. v. Davis* 406

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2. Merchandise Coupons—Liability of Assignors.—In an action by the assignee of merchandise coupon books, issued by a mining company to its employees, to recover of the mining company and his assignors, it was error to render judgment against each of the assignors for the full amount sued for, since each was liable only on his own assignments. *Id.*..... 406

ASSUMPTION OF RISK—See Master and Servant.

ATTACHMENT—

1. Discharge of Attachment—Formal Order Granting.—Where in an action brought upon an unmatured note, the plaintiff was granted an order of attachment by the clerk of the court in which the action was pending as authorized by the Civil Code of Practice, sections 237-8, and the attachment issued by the clerk was duly levied by the sheriff upon a tract of land belonging to one of the defendants, the court was without authority to discharge the attachment on the face of the papers, because of the failure of the clerk to enter, before issuing it, a formal order granting the attachment and directing its issuance by himself. *Smith v. Ruth* 566
2. Order Granting.—Under section 238, Civil Code, authorizing the clerk to "grant" an attachment in actions for debts not due, that officer may issue the attachment without making a separate order granting the attachment or directing himself to issue the writ. *Id.* 566

ATTORNEY AND CLIENT—See Guardian and Ward; Witnesses—

1. Contract for Services—Champerly and Maintenance.—A contract, for services, with an attorney under which costs are to be deducted from the proportion due the attorney is not champertous, but merely affects the quantum of fee. The residue, after deducting the costs and expenses, constitutes the fee payable under the contract. *John Druzille, Wood-Heck, etc. v. Roll* 128
2. Services—Settlement.—Under a valid contract between an attorney and client the fact that the client negotiates a settlement without consulting with the attorney does not deprive the attorney of his right to recover under the contract; the attorney having rendered considerable services and would have participated in the final settlement had he been requested so to do. *Id.* 128
3. Compensation.—In fixing the compensation due an attorney for legal services, the amount and character of the service rendered, the nature and importance of the litigation, the amount and value of the property, in contest, the skill necessary to properly attend to the business, and the professional

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standing and skill of the attorney may be looked to, together with the time, labor and trouble expended. *Irvine v. Stevenson* 305

ATTORNEYS' FEES—See Appeal and Error.

AUTOMOBILES—See Criminal Law, 2.

AWARD—See Master and Servant.

BALLOTS—See Elections.

BANKRUPTCY—

Corporations—Unpaid Stock Subscriptions—Right of Action—Trustee's Sale.—A corporation permitted its agents to sell its preferred stock with the understanding that the purchasers would receive one share of common stock as a bonus with each two shares of preferred, and that the common stock was fully paid and non-assessable. The corporation became bankrupt and the trustee sold its real estate "together with all the personal property, open accounts, notes and all assets belonging to the said Globe Casket Company, and now in the hands of the party of the first part, as aforesaid trustees." Held, unnecessary to determine whether the trustee's right of action for unpaid stock subscriptions could have been sold, but sufficient to say that it was not sold and did not pass to the purchaser at the trustee's sale, in view of the fact that the corporation was estopped to recover the unpaid stock subscription, and the liability of the stockholders was in no sense an asset of the corporation, nor was it ever in the hands of the trustee. *Stoecker v. Goodman* (eight cases) 330

BAR—See Homicide.

BENEFICIARIES—See Insurance.

BILLS OF LADING—See Carriers.

BILLS AND NOTES—See Fraudulent Conveyances—

1. Release—Evidence.—Defendant in a suit upon notes executed by him, as part price for machinery purchased, pleaded that he was released from liability thereon, by the obligee accepting as sole payor, one to whom the defendant sold the machinery, evidence examined and held to be insufficient to establish the release contended for. *People's Savings Bank v. Wright* 362
2. Release—Acceptance—Consideration.—The acceptance of a stranger to the note as payor constitutes sufficient consideration for the release by the payee of the original maker. *Id.*..... 362

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3. **Validity of Assignment—What Law Governs.**—The validity of the assignment of a note must be determined by the law of the state where the assignment is made. *Pritchett v. Kentucky Bank & Trust Co.* **403**
4. **Negotiability—Merchandise Coupons.**—Coupon books issued by a coal company to its employees, which by their terms are redeemable only in merchandise and are not transferable, are not negotiable. *Ashless Coal Co. v. Davis* **406**
5. **Endorsers—Liability.**—If, after the indorser of commercial paper has paid the debt, a recovery is had by the creditor from the principal, the indorser is entitled to recover from the creditor the amount obtained from the principal. So also if collateral notes given by a surety or indorser have been converted into money which amounts to a greater sum than the debt, the indorser or surety may recover of the holder the balance over and above the amount necessary to extinguish the debt. *Hardy Buggy Company v. Paducah Banking Co.* **776**
6. **Endorsers—Liability.**—An indorser of commercial paper is relieved from liability thereon by discharge in bankruptcy. *Id.* **776**
7. **Endorsers—Liability.**—Where a payee in commercial paper, who indorses several different notes to a bank on different occasions, afterwards becomes bankrupt, and by a composition agreement with its creditors pays the bank 20% upon the notes and is discharged in bankruptcy, but at the same time enters into a written agreement with the bank that in case the bank collects the notes in full it shall retain enough of said money, plus the 20% paid in the composition, to satisfy the full indebtedness of the indorser to the bank before it shall become liable to the indorser for any excess payment, the indorser is estopped to claim a recoupment of the bank upon a note which is over paid when other notes are unpaid. *Id.* **776**

BONDS—See Appeal and Error; Counties; Pleading.**BOUNDARIES**—See Adverse Possession; Public Lands—

Survey—Patent.—When the lines of a patent were not in fact run upon the land in the survey upon which it was based, and it cannot be determined from the calls of the patent with certainty what land it includes, if any, the patent will be held void for uncertainty. *Sproul v. Inter-State Coal Co.* **379**

BREACH—See Contracts; Damages; Estoppel; Vendor and Purchaser.**BRIBERY**—See Elections.**BRIDGES**—See Counties.

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BURDEN OF PROOF—See Deeds; Wills.

BY-LAWS—See Insurance.

CANCELLATION—See Vendor and Purchaser.

CARRIERS—

1. Assault by Servant Upon Passenger.—The law makes a carrier of passengers responsible for the acts of his servants in charge of the passenger, and who for the time being has custody of him, with the implied obligation to exercise the highest degree of diligence and care to transport the passenger safely, and this duty requires that the carrier shall protect the passenger from violence or insult from whatever source they may arise. *L. & N. R. R. Co. v. Bennett*. 445
2. Assault by Servant Upon Passenger.—In an action by a passenger against the carrier for an assault committed by the servant of the carrier upon the passenger, the carrier will not be liable if his servant acts only in justifiable self-defense as against an assault committed by the complaining passenger, but no provocation consisting of mere insulting language will justify an assault upon a passenger, nor will such provocation excuse an assault by a passenger upon the servant of a carrier. *Id.* 445
3. Duty of Carrier to Protect Passenger—Force That May be Exercised.—It is the duty of the carrier to protect its passengers from insults and abusive language engaged in by another passenger, and in doing so it may use such force as may be reasonably necessary to arrest or eject the offending passenger, but no more, and if excessive force be employed, and the offending passenger is unjustifiably assaulted and injured, the carrier must respond in damages. *Id.* 445
4. Assault by Servant of Carrier—Instructions.—It is error in such cases to instruct the jury that if the plaintiff used abusive or insulting language intending to insult the carrier's servants, or to provoke an assault, that he thereby violated his contract of carriage and is on that account estopped from asserting his claim for damages, since this would place no limit upon the corrective methods which the carrier in such cases might employ. *Id.* 445
5. Liability for Shipment if Destroyed.—A common carrier who receives freight for immediate shipment is liable for its value, if destroyed, as an insurer, unless the destruction is (1) through the act of God; (2) the public enemy; (3) the inherent infirmity of the goods. *L. & N. R. R. Co. v. Edwards' Admx.* 555

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6. Shippers—Destruction of Goods.—Freight delivered to a railroad company to which the shipper has something more to do before the shipment is to go forward, or where the shipper directs the carrier to hold the goods for his further orders, or until he loads other goods, are held by the carrier as a bailee or warehouseman, and the carrier is not liable for the value thereof if destroyed, unless the destruction was brought about through the negligence of the carrier. Id. 555
7. Shippers—Bill of Lading.—A bill of lading is not necessary in order to charge the carrier with an acceptance of the goods for immediate shipment, if the carrier in fact did so accept the goods; and a bill of lading issued by the carrier before it receives the goods does not ipso facto render the carrier responsible. Id. 555
8. Acceptance of Shipment.—An acceptance of the shipment by the carrier will be presumed where the carrier provides a car into which the goods are to be loaded by the shipper, and when the goods have been loaded the agent of the carrier closes and seals the doors of the car, and promises to deliver a bill of lading to the shipper on the next morning. Id. 555

CHALLENGERS—See Elections.**CHAMPERTY AND MAINTENANCE—See Adverse Possession; Attorney and Client—**

Champertous Contracts in General.—The sale, by a co-tenant to another co-tenant, of his interest in lands, which are claimed by them under the same title, is not champertous. Perry v. Wilson 155

CHILD LABOR—See Master and Servant.**CITIES—See Municipal Corporations.****CLASSIFICATION—See Municipal Corporations; Statutes.****CLERKS OF COURTS—See Officers.****CODES—See Statutes, Codes and Constitution.****COLLATERAL ATTACK—See Judgment; Judicial Sales.****COMMERCIAL PAPER—See Bills and Notes.****COMMISSIONERS—See Easements.****COMPENSATION—See Attorney and Client; Damages; Eminent Domain; Officers; Trespass; Trusts.**

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1. Fraud.—In an action on a compromise agreement, evidence examined and held insufficient to show that the agreement was obtained by fraud. *Berry v. Berry*..... 481
2. Fraudulent Concealment of Facts—Mistake of Law and Fact—Evidence.—Where a son's claim against his mother's estate, for services rendered in managing her farm, was compromised by the heirs, the failure of the son to disclose a settlement agreement between him and his mother was not a fraudulent concealment of facts, which would of itself avoid the compromise or furnish a basis for the contention that the compromise was made under a mistake of law or fact, where the settlement showed on its face that it related to other matters and did not include the son's claim for services, and was therefore immaterial. *Id.*..... 481
3. Requisites.—Where there is a question between the parties about which reasonable men may differ as to the outcome, the parties may adjust the difference between themselves by way of compromise, which will be upheld though it subsequently develops that one of the parties was right and the other wrong. *Id.* 481
4. Requisites—Evidence.—In an action to enforce a compromise of a son's claim against his mother's estate, for services rendered in managing her farm, executed by the son and the other heirs, held, that the fact that the services were performed, coupled with the fact that the mother proposed a settlement and carried the settlement into effect by devising to him a greater portion of the estate than he would otherwise have received, was sufficient to show that his claim was one about which reasonable men might differ, and to support the compromise. *Id.* 481

CONFIRMATION—See Judicial Sales.

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CONSTITUTIONAL LAW— See Eminent Domain; Municipal Corporations; Officers; Statutes, Codes and Constitution.

CONSTRUCTION—See Logs and Logging; Statutes; Wills.

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CONTRACTS—See Attorney and Client; Champerty and Maintenance; Deeds; Frauds, Statute of; Logs and Logging; Specific Performance—

1. Action for Damages for Breach of—Submission to Court.—Where in a common law action for damages the question of

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- the breach of a contract is submitted to the trial court without the intervention of a jury, his decision will be treated as the verdict of a properly instructed jury, and will not be set aside unless flagrantly against the evidence. *Cassidy Coal Co. v. North Fork Coal Co.* 103
2. Agency to Sell Coal.—An exclusive selling agency contract for a term which provides that the agent will use every effort to sell the principal's coal at the highest prices obtainable, and during the dull season of April, May and June will help to keep the mines running and shall not be held responsible for a larger tonnage than actually sold during the dull season, held to obligate the agent to use every effort as a competent agent to sell the output of the mine except during the dull season, at the highest market prices obtainable. *Id.* 103
 3. Agency to Sell Coal.—Where under such contract the agent during a period of six months, not in the dull season, sold less than half the output of the principal's coal mine at a lower price than inexperienced salesmen sold the same grades of coal, and failed to make settlements as provided in the contract, the agent had so violated the vital provisions of the contract as amounted to a breach thereof, and cannot complain that the principal thereafter appointed another agent and refused to quote prices to or fill orders of such original agent. *Id.* 103
 4. Parol Agreement Establishing Division Line—Estoppel.—A parol agreement between the owners of adjoining lands, establishing a division line between their lands, will not be enforced as an estoppel, where the controversy arises from overlapping deeds, causing a dispute as to the superiority of title, and therefore a dispute as to true division line, and where the agreement was not executed, by acquiescence in and recognition of the agreed line for a considerable period of time, but, was repudiated by one of the parties, within a few days, and before any intervening right occurred. *Bordes v. Leece* 146
 5. Who May Sue Upon—Consideration.—One for whose benefit a contract is made, may sue thereon, although he did not furnish the consideration. *Bryant v. Jones* 298
 6. To Obstruct Justice—Void.—A contract or agreement entered into for the purpose of obstructing or interfering with the administration of justice is void as against public policy and the courts, when called on to adjudge the rights of the parties under such a contract, will refuse to have anything to do with it. *Archie v. Brown.* 592
 7. That Secured Release of Prisoner, When not Void as Against Public Policy.—Where a father was indicted and confined in jail for failing to provide for his family, under a statute providing that he might be released by the court if he made

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- provisions for them, a contract entered into by the terms of which he made provisions for his family and was thereupon released from custody by order of the court, was not void as against public policy, as its purpose was not to obstruct the administration of the law. *Id.* 592
8. That Secured Release of Prisoner, When Not Void as Against Public Policy.—Where the prosecuting witness with the knowledge and consent of the prosecuting attorney enters into a contract by which the prisoner may be released if the court consent to it will not be void as against public policy if the purpose of the contract is to carry out the intention of the statute under which the prisoner was arrested, and the disposition of the prosecution is left entirely in the hands of the court and the prosecuting witness is ready and willing to appear when called on. *Id.* 592
9. Building Contracts—Measure of Damages for Defective Work.—Ordinarily the measure of damages for defective work under a building contract is the difference between the value of the building as constructed, and what its value would have been if it had been constructed according to the contract; but where the contractor wilfully varies from the contract by using materials not only different from those contracted for, but wholly unsuitable for the purpose, the measure of damages is the actual cost of reconstructing the building according to the contract. *Young v. Cumberland County Educational Society* 625
10. Building Contracts—Damages for Defective Work—Finding—Evidence—Sufficiency.—Where, in an action on a building contract, the owner counterclaimed for damages for defective work, evidence examined and held insufficient to sustain the chancellor's finding that the building was worthless. *Id.* 625
11. Consideration.—The payment, before it is due, of a portion of a purchase price of timber, is a sufficient consideration for a reduction in the price by the vendor. *Johnson v. Broughton*.. 628
12. Covenant to be Performed—Pleading and Proof.—One who sues upon a contract, which contains a covenant to be performed by him, and upon which the promise of the other party depends, can not recover without alleging and showing the performance of the condition precedent by him. *Louisville Trust Company v. McCabe*..... 801

CONTRIBUTORY NEGLIGENCE—See Appeal and Error, 3;
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CORPORATIONS—See Bankruptcy; Escheat; Evidence—

1. Subscriptions to Stock—Liability for Unpaid Subscriptions—Bona Fide Purchasers.—A corporation issued a certificate of common stock to an agent, with the agreement that the com-

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- mon stock should be given as a bonus to purchasers of preferred stock, who were informed that they would receive one share of common stock with each two shares of preferred. No stock was assigned to the purchasers by the agent, but the stock was issued and accepted by them directly from the company. Held, that such purchasers were not bona fide transferees for value, but were liable to the creditors of the corporation for the par value of the common stock. *Stoecker, Schreick, Kaelin, Schuler, Doerhoefer and Stoke v. Goodman; Kaiser v. Goodman; Jochim v. Goodman; Miller v. Goodman; Sebolt v. Goodman; Lang v. Goodman; Ruby v. Goodman; Ehell v. Goodman* 330
2. Subscriptions to Stock—Bonus Common Stock With Subscription to Preferred Stock.—Where persons subscribed for preferred stock at a par value of \$25.00 per share, at the price of \$35.00 per share, with the understanding that they would receive one share of common stock with each two shares of preferred, the additional \$10.00 was paid solely as a premium on each share of preferred, and was in no sense a payment on the common stock, and the purchasers were not entitled to have their indebtedness for the common stock credited by the premium paid on the preferred stock. *Id.* 330
 3. Subscriptions to Stock—Liability of Stockholders to Creditors.—Under Constitution, section 193, and Kentucky Statutes, section 547, the liability of stockholders to creditors of a corporation for unpaid stock subscriptions is absolute, and is not affected by the creditors' knowledge, or want of knowledge, when the credit was extended, that the stock was issued with the understanding that it was not to be paid for. *Id.* 330
 4. Designation of Agent Upon Whom Process May be Served.—A corporation which has failed to comply with the requirements of section 571, Ky. Stats., can not, lawfully, do business in the state of Kentucky, and can not maintain a suit for the protection of a business which is being conducted contrary to law. *Hayes v. West Virginia Oil, Gas and By-Products Co.* 622
 5. Designation of Agent Upon Whom Process May be Served.—A corporation which does business, in this state, without complying with section 571, Ky. Stats., can not make its acts before complying with the statute, valid, by a compliance with it thereafter. *Id.* 622
 6. Representation of Agents—Scope of Authority—Estoppel.—It was not within the apparent scope of the authority of the vice-president and general manager of a corporation, owning a lease of coal mining property, who had authority to sell the lease only for cash and who went as the representative of a third party, who had sold the property covered by the lease, for the purpose of delivering the deed and collecting the purchase price consisting of cash notes and stock, to represent to

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- the intending purchasers that the title to the property covered by the lease was perfect, and thereby estop the lessee corporation from asserting its claim under the lease. *Empire Coal Mining Co. v. Empire Coal Co.*..... 699
7. Wrongful Receipt of Assets—Accounting.—One who owns all of the capital stock of a corporation and who converts to his own use the corporate assets without paying its debts, must respond personally to creditors to the extent of the value of the corporate assets thus wrongfully received by him. *Martin v. City of Lexington* 714

CROSS-APPEAL—See Appeal and Error.

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COUNTIES—

1. Fiscal Courts—Records.—A fiscal court can speak or contract only through its records properly made. *Riddell v. Boone County* 77
2. Fiscal Courts—Road Bonds.—After road bonds have been issued and sold upon a 4 per cent interest basis, the fiscal court is without authority to exchange new 5 per cent bonds for the old issue of 4 per cent bonds and thus increase the interest rate, without consideration. *Id.* 77
3. Fiscal Courts—Contract to Sell Road Bonds.—The mere fact that the members of the fiscal court verbally directed salesmen to tell prospective bond purchasers that the 4 per cent bonds might be exchanged for 5 per cent bonds if the county later decided to issue 5 per cent bonds, was ineffectual to confer authority upon the salesmen to make such contract, in the absence of a properly entered order of the fiscal court. *Id.*..... 77
4. Collection of Bridge Tolls.—A county, which has not the right to collect tolls for the use of a bridge, and lets the privilege of collecting tolls to a lessee, who pays the rent into the treasury of the county, cannot be sued for the tolls, by a citizen. *Breathitt County v. Hagins*..... 294
5. Actions Against.—A county is a political division of the state created for the administration of the government, and can not be sued by a citizen, unless express power is given to do so, by a statute, or an implied right is necessarily to be drawn from an express power given, or unless the liability arises from an express contract, which the county has authority to make. *Id.* 294

GOUPONS—See Actions; Assignments; Bills and Notes.

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CRIMINAL LAW—See Homicide; Indictment and Information;
Perjury—

1. Negligence in Use of Dangerous Agency.—Carelessness or negligence in the use of an agency necessarily dangerous to the life, limb or property of another, in close proximity thereto, is culpable. *Held v. Commonwealth*..... 209
2. Careless Operation of Automobile—Negligence.—An automobile when being operated upon a public street of a city within the business district during business hours, is an agency necessarily dangerous to the life, limb and property of others, whose presence at such time and place must be anticipated; and its careless operation under such circumstances is culpable negligence. *Id.* 209
3. Mental Condition of Defendant—Evidence.—Question of appellant's mental condition having been submitted to the jury under proper instruction, the record examined, the court finds there is no ground to reverse the judgment of the jury finding appellant guilty. *Garman v. Commonwealth*..... 455
4. Connected Criminal Acts.—Where several criminal acts committed by the accused are so connected with respect to time and locality as to form an inseparable transaction and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such acts, evidence of same is admissible to prove the whole general plan. *Id.* 455
5. Evidence—Admonition.—The admonition of the court as to the admission of testimony relative to the second shooting was proper; even though the language used was inapt it was not prejudicial to the accused. *Id.* 455
6. Defense of Insanity.—Testimony by defendant that he did not consciously kill his victim, against whom it is proven without contradiction he entertained malice or ill will, is of probative value only in support of the defense of insanity to show the absence of any motive whatever, but has no probative value to show the absence of malice merely of a sane person. *Harris v. Commonwealth*..... 542
7. Evidence.—Where there is evidence for the Commonwealth sufficient to warrant the verdict of the jury, it will be sustained notwithstanding the evidence for the defendant is in conflict therewith, the jury being the judges of the facts. *Bingham v. Commonwealth* 688

CROSSINGS—See Negligence.

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DAMAGES—See Appeal and Error, 9; Contracts; Infants; Master and Servant; Waters and Water Courses—

1. Excessive Damages.—Where plaintiff by a collision with a train was thrown about 25 feet and sustained bruises to different parts of his body, a fracture of his elbow and a wrenching of his back, and was made to suffer considerable pain and disabled from work for several months, a finding in his favor for \$650.00 will not be set aside as excessive. *Louisville & Interurban Railroad Co. v. Clore* 261
2. Excessive Damages.—A verdict of \$10,000.00 held to be so excessive as to indicate prejudice or passion upon the part of the jury, because of the inconclusive character of the scant evidence of permanency of injuries asserted to have resulted from an accident which seemed trivial at the time and was followed only tardily by any symptoms of serious injury. *I. C. R. Co. v. Basham* 439
3. Damages—Excessive Damages—Assault Upon Passenger by Servant.—Where a passenger was struck near the temple by a servant of the carrier who had a pencil in his hand, a part of which was broken off in the wound inflicted and remained there for four months, a large portion of which time plaintiff was prevented from eating solid food and from performing any labor and suffered severe pains for several months, a verdict for \$1,000.00 will not be set aside as excessive. *L. & N. R. Co. v. Bennett* 445
4. Measure of Damages for Breach of Contract.—For a breach of a contract where there is no bad faith or fraud in evidence the measure of damages as a general rule is compensation for the loss which naturally results from the breach, limited, however, to such losses as the parties might have reasonably contemplated as a probable consequence and which are capable of being eliminated with reasonable accuracy. *Bugg & Franks v. Jones* 600
5. Loss of Time in Furnishing Road Implement—Compensation.—For delay in failing to furnish a roller according to contract with which to construct a road, the damages should be limited to compensation for loss of time, the differences in cost of construction and necessary repairs occasioned by the delay if sufficiently proven to permit of reasonably accurate estimation. *Id.* 500
6. Evidence of Profits.—Evidence of profits should be excluded under such circumstances, since compensation for losses resulting from the delay covered the whole loss. *Id.* 500
7. Excessive Damages.—A verdict for \$500.00 held excessive where the evidence did not show damage with sufficient accuracy to permit of reasonable estimation beyond \$150.00 for loss of time. *Id.* 500

DAMAGES—Continued—**Page**

8. **Negligent Destruction of Property.**—Where personal property which is actually in use at the time and can be replaced is destroyed negligently, the owner may recover its value at the time and in addition as special damages the value of its use until it could be replaced or interest from the date of destruction, but he can not recover both interest and the value of its use. *L. & N. R. Co. v. Schuster*..... 504

DEATH—See Railroads; Trial.

DEBTOR AND CREDITOR—See Exemptions; Homestead.

DECEDENTS' ESTATES—See Judicial Sales.

DECLARATIONS—See Evidence.

DEEDS—See Appeal and Error; Homestead—

1. **Presumption of Validity.**—Where a deed had been duly executed, acknowledged and recorded there is a presumption of its validity and regularity, to overcome which the evidence must be clear and convincing. *Banner v. Asher*..... 24
2. **Performance of Contract to Convey.**—The execution of a deed by grantor to a third party, at the instance and request of grantor, will be considered the performance of the contract or agreement of grantor to convey. *Jenkins v. Dawes*..... 25
3. **Tender.**—A tender or execution of a deed is proper when made to the person directed by the purchaser to receive it. *Id.* 25
4. **Constructive Notice.**—A recital in a deed of record that the grantor is selling only a homestead in the lands, is constructive notice to all subsequent purchasers, and precludes their claiming the fee simple title as innocent purchasers. *Tobien v. Gentry* 80
5. **Title—Delivery.**—The title to real estate passes upon the execution and delivery of the deed. *Perry v. Wilson* 155
6. **Extrinsic Parol Evidence.**—Extrinsic parol evidence is not admissible to identify the property, which the parties had in mind, when making the contract, as the writing must identify it, but, such evidence is admissible to designate the property, which was identified in the minds of the parties, as expressed in the writing. *Id.* 155
7. **Undue Influence—Burden of Proof.**—Where there exists between two persons a relation of confidence and trust, by which one may exert an undue influence over the judgment of the other, and a voluntary conveyance beneficial to the grantee is made, the burden of proof is on the person benefited to show the grantor acted freely and of her own volition. *Bacon v. Dabney*..... 193

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8. Defeasible Fee.—A defeasible fee, is a vested estate and may be sold and conveyed, and the title will be good in the vendee, unless the event occurs, which defeats the estate, in which event, the title fails. *Fulton v. Teager*..... 381
9. Remainders.—If the owner of a remainder interest is capacitated to enter into the possession as soon as the life estate, upon which it is limited, ends, it is a vested remainder, and the owner may sell and convey it, and pass a good title, as he is the owner of the fee, subject only to the life estate. *Id.* 381
10. Defeasible Fee—Contingent Remainders—Executory Devise.—A contingent remainder can not be limited upon a defeasible fee, but, a contingent interest may be limited upon such a fee, by a will, and it constitutes a valid estate, but, it is not a remainder, but an executory devise. *Id.*..... 381
11. Contingent Interest.—A contingent interest in lands, created by an executory devise, may be sold and conveyed by deed, or it may be devised by will. *Id.*..... 381
12. Contingent Interest.—A contingent interest, in lands, created by an executory devise, may be conveyed, where the person to whom the interest is to pass, if the contingency happens, is fixed and certain, and the uncertainty making it a contingent interest arises only from the uncertainty of the event, upon which the interest will vest, and such contingent interest, when conveyed, will vest in the vendee, when the event, upon which it depends, occurs, or it will pass, by inheritance, to the heirs of the one to whom it is to pass, if such one is dead, when the event occurs, upon which the interest will vest. *Id.* 381
13. Religious Societies—Acquisition of Property—Reversion.—In the year 1804, grantor conveyed to the trustees of the Presbyterian congregation two acres of land "for the purpose and use of a Presbyterian meeting house and for no other purpose whatsoever," the deed providing that when "the said Presbyterian meeting house ceases to be continued for the aforesaid purpose, the said trustees, or their successors, do oblige themselves to convey the aforesaid two acres to said William Purdy, or his heirs, for the same sum they now pay for the land." In 1854 the trustees acquired two adjoining lots and erected a church building on those lots and partly on the land in controversy. Held, that the trustees had the right to locate the meeting house on such portion of the land in controversy as they saw fit, and that so long as any portion of that land was occupied by the meeting house, the title did not revert to the grantor or his heirs. *Lyle v. Purdy* 677

DEFAULT JUDGMENT—See Judgment.

DEFEASIBLE FEE—See Deeds.

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DEFENCES—See Discovery.

DELIVERY—See Deeds.

DEMURRER—See Pleading.

DEPOSITIONS—See Appeal and Error.

DESCRIPTION—See Frauds, Statute of.

DISCOVERY—

1. Transfer of Claims—Defenses—Evidence.—Where defendant in a judgment transfers to plaintiff therein claims aggregating more than the amount of the judgment upon condition that plaintiff would institute suits to recover the claims and suspend proceedings on the judgment as against defendant until the recovery of a final substantial sum, in a suit upon the claims plaintiff can not proceed to collect the judgment against defendant when he fails to prosecute suits upon the claims and permitted them to become barred by limitation without taking action. Such facts constitute a defense in a suit for recovery brought upon a return of no property found after execution upon the judgment against defendant. *Charles I. Hudson & Company v. Wood*..... 16
2. Transfer of Claims.—A transfer of claims upon the terms mentioned in division No. 1 above is different from an accord and satisfaction, since the transferee obligates himself to do certain things and to suspend action as against the transferor until those things are done; while in accord and satisfaction the transfer operates ipso facto to extinguish the claim against the transferor. However, if the transaction in this case amounted to an accord and satisfaction it would not be affected by the rule that a fixed indebtedness may not be satisfied by the payment of a smaller sum, since the claims transferred are nominally greater than the claim against the transferor, and in addition, some of them belonged to and were transferred by a third party. *Id.*..... 16
3. Transfer of Claims.—A transfer of claims upon the terms mentioned in division No. 1 imposes greater duties upon the transferee than those of a mere holder of collateral security, the duties of the latter being that the security holder must exercise due diligence to collect the collaterals and is liable for damages for a failure to exercise it, while in the other case he is not only subjected to the same duties, but can not proceed on the original claim until he has prosecuted the collaterals to judgment. *Id.* 16

DISCRETION—See Husband and Wife; Divorce.

DISCRIMINATION—See **Taxation**.

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DISMISSAL—See **Appeal and Error**.

DISTRIBUTION—See **Wills**.

DIVORCE—

1. **Cruel and Inhuman Treatment**.—A base and unfounded charge of unchastity and adultery made by the husband against his wife constitutes such cruel and inhuman treatment as to entitle her to a divorce upon that ground; but the charge by the husband in order to amount to such cruelty must be deliberately made and not made capriciously or in a fit of jealousy or under circumstances not showing a determination to falsely prefer the charge. *Johnson v. Johnson*..... 421
2. **Alimony—Discretion of Court**.—The question of the amount of alimony to be allowed the wife upon the granting of a divorce is one which addresses itself to the sound discretion of the court in the light of the facts of each particular case, there being no definite and fixed rule upon the subject. *Id.*.... 421
3. **Alimony—Allowance—Appeal and Error**.—Where the testimony shows to a reasonable certainty that the husband possesses property to the value of between \$4,000.00 and \$5,000.00, and the wife has property to the amount of only about \$650.00, and has in her custody two of the infant children, an allowance to the wife of \$750.00 and \$100.00 to her attorney will not be disturbed as excessive. *Id.*..... 421
4. **Alimony—Evidence**.—Where the husband seeks a divorce upon the sole ground of himself and wife living apart without cohabitation for five years, the wife by her answer may seek and obtain alimony, provided she was not at fault in bringing about the separation. *Id.*..... 421
5. **Abandonment—Alimony**.—An action may be maintained by the wife for alimony independent of a suit for divorce, if the husband has abandoned her or treated her in such a cruel and inhuman manner as to force her to leave him, and she is without fault. *Williamson v. Williamson*..... 435
6. **Pleading**.—In such action it is unnecessary to aver in the petition that cause for divorce had occurred or existed in this state within five years, as required in suits for divorce by section 423 of the Civil Code and section 2120, Ky. Stats. *Id.*..... 435
7. **Alimony**.—Such an action is transitory except as localized by section 76 of the Code to the county of the wife's residence, but over which any court having jurisdiction of the subject matter may acquire jurisdiction of the defendant where he is summoned or voluntarily appears and makes defense. *Id.* 435
3. **Cruel and Inhuman Treatment**.—Refusal of the husband to permit wife's children of tender years, by a former marriage,

DIVORCE—Continued—

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- to remain in his home, under circumstances of this case, is such cruel treatment of the wife as justified her leaving him without forfeiture of her right to alimony. *Id.*..... 435
9. Alimony.—While allowance of \$1,000.00 as alimony to wife without fault or abandonment of husband who owns property of \$8,000.00 or more would be too small under ordinary circumstances, it is not so under peculiar circumstances of this case. *Id.* 435
10. Restoration of Property.—Where one spouse obtained property from the other during marriage and by reason thereof, it should be restored to the one from whom it was obtained on a decree of divorce. *Dunn v. Dunn*..... 841
11. Restoration of Property.—Property deeded by the husband to the wife without consideration during marriage, and money furnished by him to her with which to purchase property are presumed to have been obtained through and by reason of the marriage relation and should be restored by a judgment divorcing the parties. *Id.* 841

DOWER—

1. Devise in Lieu of Dower.—Where a husband devises property to his wife, it is presumed that the devise is in lieu of dower, unless the will expressly shows a contrary intention, or the latter intention is necessarily inferable from the will. *Perry v. Wilson* 155
2. Devise in Lieu of Dower.—Where a devise is made to the wife by the husband, in lieu of dower, the wife is barred from claiming dower, in the lands of the deceased husband, unless she within twelve months, renounces the provisions of the will in the manner provided by law. *Id.*..... 155
3. Devise in Lieu of Dower—Failure to Renounce Will.—Where a widow fails to renounce the provisions of a deceased husband's will for her benefit, within the time provided by law, it is presumed, that she has elected to accept the provisions of the will, in lieu of dower and distributable share. *Id.*..... 155
4. Law of the Place.—The title to real estate is governed, solely, by the law of the place, where it is situated, and the widow of an owner of real property, in this state, who resides in another state, is entitled to dower, in the lands in this state, solely, by virtue of the laws of this state, and her right to same must be measured by the conditions and restrictions, which the laws of this state, impose upon the right to dower. *Id.* 155

DREAM—See Wills, 12.

DRUNKENNESS—See Homicide.

EASEMENTS—See Waters and Water Courses—

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1. Prescription.—It is incumbent upon one claiming an easement or roadway over the lands of another, to establish his right thereto, by grant or prescription. *Morris v. Daniel*..... 780
2. Commissioner's Report—Failure to Confirm.—In a suit for partition of lands the commissioners appointed to divide the property, made a report in writing dividing the lands into four parts, and designating by metes and bounds a passway from lot No. 4, over and across lots Nos. 1 and 2 to the public highway. This report was filed with the clerk and placed with the other papers in the partition suit, but the report was never confirmed by the court or recorded, and the judgment in the case did not mention the roadway recommended in the report, nor did the deeds made by the commissioner to the allottees provide for such roadway. Held, that such unrecorded and unconfirmed report of commissioners did not vest in the owner of lot No. 4 an easement over lots Nos. 1 and 2. *Id.*..... 780
3. Commissioner's Report.—An unconfirmed commissioner's report has no force or effect upon the subsequent proceeding, especially where the judgment does not refer to it or the deeds follow the recommendations contained in the report. *Id.* 780

ELECTION—See Homestead.**ELECTIONS—**

1. Action to Set Aside—Policy of the Courts.—It is the policy of the courts to uphold the validity of elections, and before they can be set aside for fraud or other invalidating facts the proof should be clear and conclusive of the existence of such facts; and notwithstanding there may be proof of the deposit of fraudulent votes in the ballot box, if the number of such votes can be ascertained from the evidence, and it can further be determined for whom they were cast, they will be deducted from the total vote received by the person or measure for which they are cast, rather than to declare the election void. *Hall v. Martin*..... 120
2. Bribery—Evidence.—The fact that a worker for a candidate in the election was seen to have distributed money among five or six voters who it is claimed thereafter voted the second time is only evidence of bribery and fraud and is not of itself sufficient to throw out the vote of that precinct in the absence of some testimony to show that such voters were improperly influenced to and did vote as a result thereof, especially so as to another candidate in no way connected with the suspicious circumstances. *Id.* 120
2. Challengers and Inspectors.—Neither the fact that a challenger or inspector is a non-resident of the precinct, although a resident of the county, nor the further fact that after the

ELECTIONS—Continued—**Page**

polls closed the ballot box was taken to a nearby place where the votes were counted and where there was both light and heat, neither of which was obtainable at the polling place, is sufficient to render the election at that precinct void so as to require that it be entirely rejected. Id. **129**

4. How Conducted.—By section 147 of the Constitution and Statutes enacted pursuant thereto, elections are required to be by secret ballot, and if the legal requirements for that purpose are violated to such an extent that as many or more than twenty per cent of the voters cast their votes openly without being sworn as required by law, the election would have to be declared void. Id. **129**
5. When Contest Will Fail.—Notwithstanding it appears from the proof that the number of illegal votes alleged were cast, still if contestee has a majority, after deducting such votes, relief will be denied the contestant and his petition will be dismissed. Id. **129**

ELECTRICITY—See Master and Servant, 10.

EMINENT DOMAIN—

1. Drains—Railroads—Closing Rights of Way and Rebuilding Track.—By subsection 13 of section 2380, Kentucky Statutes, railroad companies are expressly required to bear the expense of closing their rights of way and rebuilding their tracks, bridges, &c., made necessary by the improvement of a natural water course by a board of drainage commissioners in the erection of a drainage district; their recovery being limited to the expense of opening their rights of way for such purpose. *L. & N. R. R. Co. v. Board of Drainage Commissioners of Davies County* **282**
2. Drains—Railroads—Constitutional Law.—Since the erection of the drainage district has for its purpose the drainage of a portion of the state to make it healthful and fit for habitation and cultivation the same is an exercise of the state's police power, and is not within the protection of the guarantees of section 242 of the state Constitution, and hence the act authorizing such improvement is not a violation thereof, in denying to a railroad company compensation for injuries or damages resulting therefrom. Id. **282**
3. Taking Private Property for Public Use—Compensation.—Constitution, section 13, Bill of Rights, and section 242, which declare municipal and other corporations and individuals, invested with the privilege of taking private property for public use, "shall make just compensation for the property taken, injured or destroyed by them," applies to the building without right of a fill for a railroad on the land of another, or the

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- obstructing of the means of ingress and egress to and from his land. *Hazard Dean Coal Co. v. McIntosh*..... 316
4. **Taking Private Property for Public Use—Compensation.**—Under the provisions of the Kentucky Statutes, Bill of Rights, section 13, forbidding the taking of private property for public use without the consent of the owner, "and without just compensation previously made to him," which inhibition section 242, Constitution, extends to the injuring or destroying of property as well as the taking thereof, a county court is without power to cause a public road to be opened upon the land of the owner without just compensation, paid him before the road is opened and before depriving him of the possession of the land for that purpose. And this is so, although the necessity for the road and its establishment may have been determined, and the amount of the damages due the owner by way of compensation for the taking of the land for the road fixed and directed to be paid, by the judgment of the county court in the manner prescribed by the statute on that subject. *Bushart v. County of Fulton*..... 471
5. **Taking Private Property for Public Use—Compensation.**—A judgment of the county court fixing the compensation of the landowner in such case and ordering it paid, is not a sufficient compliance with the requirements of the Constitution. It must be paid or a tender of it legally made to the owner, before his land can be taken for the road. *Id.* 471

ENDORSERS—See Bills and Notes.**EQUITY—See Appeal and Error, 50; Judgment—**

1. **Relief.**—Where issue is joined in a suit in equity the court may under a prayer for general relief grant any relief to which the parties show themselves entitled. *Johnson v. Johnson* 421
2. **Transfer to Equity.**—Plaintiff's motion to set aside the submission and to file a tendered amendment and transfer the case to the equity side of the docket should have been sustained; said motion having been made on the day the court sustained the demurrer to the petition, the court, under a previous ruling, having overruled the demurrer to the petition. *F. T. Justice & Co. v. Rogers* 466

ESCHEAT—

1. **Enforcement.**—A corporation may hold real estate for a longer period than five years, although not devoted to legitimate corporate use, if it is held in anticipation of its future use for legitimate corporate purposes, with an ever present intention

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- to devote it to such use. *Commonwealth v. Mehler & Eckstenkemper Lumber Co.* 11
2. **Enforcement.**—Upon proof by the Commonwealth in an action to escheat real estate, that it has been held for longer than five years, without having been devoted to use for legitimate corporate purposes, the burden of proving that it is being held for such future use with an ever present intention of so using, shifts to the defendant. *Id.* 11
3. **Enforcement.**—The intention with which real estate is being held by a corporation beyond five years, as a necessary ingredient in the offense that will escheat the property, is provable not alone by the minutes of the directors' meeting but by any evidence that has probative value of the defendant's real intention in holding it. *Id.* 11
4. **Enforcement—Evidence.**—The uncontradicted evidence of the defendant's president of its intention and purpose with reference to the lot attempted to be escheated in this action held to be sufficient to avoid an escheat. *Id.* 11

ESTOPPEL—See Contracts; Infants; Logs and Logging; Pleading—

1. **Vendor and Purchaser—Breach of Warranty—Arbitration and Award—Abandonment.**—A purchaser of land is not estopped to rely on a covenant of warranty by an agreement to arbitrate, where the agreement was never carried out but was abandoned. *Scott v. Scott* 604
2. **Mines and Minerals—Claims Under Lease—Permitting Improvements and Expenditures.**—The lessee of a coal mine is not estopped from asserting its claim under the lease against a purchaser of the property, by permitting the purchaser to make improvements thereon, where the purchaser had both actual and constructive knowledge of the lease and knew that the lessee was asserting its claim prior to the making of the improvements. *Empire Coal Mining Co. v. Empire Coal Co.* 699
3. **Relying or Acting Upon Representations.**—A person who induces another to believe and act in a certain manner will not afterwards be permitted to prejudice or injure such person because of the acts or things he did under the belief that they were consented to. *George v. Ford* 808
4. **Acts Inducing Payment of Money.**—Acts and conduct of the appellants in inducing the appellee to pay money under contract estop them from now claiming that the contract had been cancelled and annulled. *Id.* 808

EVIDENCE—See Adverse Possession; Appeal and Error, 43-46;
Arrest; Assault and Battery; Bills and Notes; Contracts;
Criminal Law; Discovery; Divorce; Elections; Escheat;

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Fraudulent Conveyance; Homestead; Homicide; Insurance; Landlord and Tenant; Logs and Logging; Master and Servant; Mines and Minerals; Mortgages; Negligence; Perjury; Physicians and Surgeons; Public Lands; Trespass; Trial; Waste—

Corporations—Declarations of Agents—Admissibility.—The declarations of agents of a corporation are binding on the corporation only when made in the course of, or in connection with, the performance of their authorized duties. *William Craig's Admx. v. Kentucky Utilities Co.*; *George Craig, By, etc. v. Kentucky Utilities Co.*..... 274

EXCEPTIONS—See Appeal and Error; Judicial Sales.

EXCESSIVE DAMAGES—See Damages; Railroads.

EXECUTION—

Purchase of Land at Sheriff's Sale Under Execution—Liens—Title.—One in possession of land by its purchase at a sheriff's sale under an execution against the owner and a deed from the sheriff, will, prima facie, be entitled to it as against a lien asserted upon it by another by virtue of a mortgage on the land, made after the purchase at the execution sale received his deed from the sheriff by one claiming to own it as a vendee of the execution debtor under a deed from the latter. But where it is made to appear that the land had, by a deed of record from the execution debtor, been conveyed the mortgagor before the judgment of the execution creditor against the execution debtor was obtained or before levy of the execution, although after the institution of the action the mortgage lien asserted by the mortgagee would be superior to the title of the purchaser at the execution sale, unless, as here alleged by the latter, such deed and the mortgage thereafter executed were fraudulently made to defeat the debt of the execution creditor, of which there is no satisfactory proof in the record of this appeal. *O'Bryan v. O'Bryan*..... 766

EXECUTORS AND ADMINISTRATORS—See Taxation—

1. Removal.—Administrators have such an interest in the execution of their trusts as entitles them to protection from removal without just cause. *Rieke's Admr. v. Rieke*..... 131
2. Removal.—The assertion by an administrator with the will annexed of an interest in the estate as the surviving husband of one of the devisees, not admitted by the other parties interested therein and friction resulting therefrom, and a controversy as to the value of his services, do not prove him incapable of discharging his trust, or furnish cause for his removal under section 3846 of the statutes. *Id.*..... 131

EXECUTORS AND ADMINISTRATORS—Continued—**Page**

- 3 Removal of Administrator—Appointment of Administrator De Bonis Non—Effect of Striking Out Words "De Bonis Non."—Where administrators are removed and another appointed in their stead, the latter is an administrator de bonis non, whether the words "de bonis non" are used in the order of appointment or not, and the action of the county court in subsequently striking out these words on the ground of clerical misprision did not affect the relation which the later sustained to the estate. *Yancy's Admr. De Bonis Non v. Yancy*.... 512
4. Rights and Powers of Administrator De Bonis Non—Recovery from Predecessor.—Under the common law rule which prevails in this state, an administrator de bonis non can recover from his predecessor or his personal representative only such estate of the decedent as remains in specie, and cannot recover the proceeds of such as had been converted into money, unless such proceeds were kept separate and were susceptible of identification. *Id.*..... 512
5. Administrator De Bonis Non—Assets Wasted—Right of Action.—For assets wasted by the first administrator, the right of action is not in the administrator de bonis non, but in the distributees, heirs or creditors. *Id.* 512
6. Action Against Predecessor and Surety by Administrator De Bonis Non—Petition—Sufficiency.—In order for an administrator de bonis non to recover of his predecessor and the surety on his bond, he must allege that his predecessor had in his hands unadministered assets in kind, or the proceeds of such as had been converted into money and kept separate and unmixed with those of his own; otherwise, the petition is bad on demurrer. *Id.* 512

EXECUTORY DEVISE—See Deeds.**EXEMPTIONS—See Homestead—**

1. Specific Articles of Personalty.—In the absence of a statute creating exemptions, all property is subject to execution, hence, the right of the debtor to an exemption must be determined by the statute creating the exemption; and when specific articles of personal property are made exempt by statute from sale for the payment of a debt or debts of the owner, the courts are not authorized, by construction, to extend the exemption to other articles or different property. *Peoples Bank of Springfield v. Cocanaugher* 73
2. Corn and Tobacco—Income Earned by Labor.—Neither corn nor tobacco produced by the debtor or his family is "income earned by labor," within the meaning of section 1697, Ky. Statutes, and is not exempt from coercive sale for the payment of the latter's debts, except when the debtor has not pro-

EXEMPTIONS—Continued—

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- vender on hand suitable for the maintenance of his family or live stock, as in such case the corn or tobacco, or a sufficiency of it for that purpose, may be exempted in lieu of the necessary provender not on hand. Id. 73
3. Income Earned by Labor.—The "income earned by labor," contemplated by section 1697, Ky. Stats., is an income which can be measured in denominations of money, per month, the receipts being similar in character to such as are received from a salary or wages, although not necessarily payable at fixed times or in fixed amounts, but at the times and in the amounts the proceeds of labor may be received, as in the case of proceeds from the occupation of a mechanic and the like. Id. 73

EXHIBITS—See Pleading.**EXPERT TESTIMONY—See Logs and Logging.****EXTRINSIC EVIDENCE—See Wills.****FALSE IMPRISONMENT—**

1. Defenses.—It is no defense to an action for false imprisonment that the defendant who made the arrest was acting under the directions of a superior officer, since the arresting officer must himself be authorized to make the arrest under some of the provisions of sec. 36 of the Criminal Code of Practice. *Grau v. Forge* 521
2. Submission of Issue—Instructions.—If the facts constituting the authority to make the arrest are disputed, the issue should be submitted to the jury under instructions from the court; but if such facts are undisputed, it then becomes a matter for the court to decide, and where the undisputed facts show that the arresting officer in the exercise of a sound discretion had reasonable grounds to believe that the one arrested had committed a felony, it is the duty of the court to so direct the jury by a peremptory instruction. Id. 521

FALSE SWEARING—See Perjury.**FEES—See Attorney and Client; Guardian and Ward; Officers.****FELLOW SERVANTS—See Master and Servant.****FINAL JUDGMENT—See Appeal and Error.****FINDINGS—See Adverse Possession; Appeal and Error; Insurance.****FISCAL COURTS—See Counties.**

FORCIBLE ENTRY AND DETAINER—

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- 1 No Bar to Action for Trespass or Waste.—Under section 468 of the Code proceedings under a writ of forcible entry or detainer do not bar an action for trespass or waste, but in such an action an injunction should not be granted. *Newton v. Farris* 288
- 2 Where forcible detainer proceedings are pending in the circuit court on traverse the plaintiff should not be allowed by an injunction while the forcible detainer proceedings are pending, to take possession of the premises that the defendant in the forcible detainer proceedings claims the right to the possession of. *Id.* 288

FORFEITURE—See Insurance.

FRANCHISES—See Taxation.

FRAUD—See Mortgages.

FRAUDULENT CONVEYANCES—

- 1 Bills and Notes—Fraudulent Assignment—Evidence—Sufficiency.—In an action to set aside the assignment of a note by the payees to the wife of one of the payees, evidence examined and held to support the finding of the chancellor that the assignment was in fraud of creditors. *Pritchett v. Kentucky Bank & Trust Co.* 403
- 2 Husband and Wife.—A wife having been deeded certain property by her husband at a time when he was solvent, the property being hers, she is privileged to thereafter dispose of it as she might deem fit, and a conveyance by her of said property, or a portion thereof, to a creditor of her husband is not a preferential conveyance under section 1910 of the Kentucky Statutes, nor can other creditors of the husband complain. *Best, Rec. v. Melcon* 785

FRAUDS, STATUTE OF—

- 1 Sufficiency of Description.—If the description in the deed or writing is sufficient to identify it, so that it can be designated by parol proof, and the words of description in the writing applied with certainty to the exact property, which the parties had in mind, when making the contract, the description is sufficient to meet the requirements of the statute of frauds. *Perry v. Wilson* 156
- 2 Parol Contract for Purchase of Land.—A parol or verbal sale or purchase of land is void and confers upon the purchaser no legal or equitable interest whatever in the land, but only such collateral equities as may arise out of the transaction such as a lien on the land for the purchase money paid, if the

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- possession has been transferred pursuant to the verbal purchase. A parol contract for the purchase of land is unenforceable. *Sizemore v. Davidson* 166
3. Promise to Pay Debt of Another.—A promise to pay the debt of another, which is founded upon a different consideration from the consideration of the debt, and the promise is not made to the creditor, is not within the statute of frauds. *Bryant v. Jones* 298
4. Interest in Lands—Standing Timber—Memorandum—Signature—Party to be Charged.—Under Kentucky Statutes, sec. 1409, subsection 13, no contract for the sale of standing timber is enforceable unless the contract, or some memorandum thereof, be in writing, signed by the person to be charged, or his duly authorized agent, and the person to be charged is the vendor. *Johnson v. Broughton*..... 628
5. Interest in Lands—Standing Timber—Oral Contract to Purchase and Convey to Another.—An oral contract to purchase land or standing timber and convey it to another is within the statute of frauds. *Id.* 628
6. Benefit of the Statute—Pleading.—Where plaintiff pleads an oral contract within the statute of frauds, the defendant may obtain the benefit of the statute under a general denial of the contract. *Id.* 628

GROUND—See New Trial; Specific Performance.

GUARDIAN AND WARD—See Parent and Child—

1. Employment of Attorneys—Services.—A guardian is authorized to employ attorneys to prosecute and defend actions for his ward, and to bind their estates to pay a reasonable fee for the services of the attorneys. *Irvine v. Stevenson*.... 305
2. Payment of Attorneys' Fees.—Before the estate of an infant can be subjected to the payment of counsel fees, upon a contract with the guardian, it must appear, that the services were actually rendered, and that they were reasonably necessary for the protection of the interests of the infants, and that the sums charged are reasonable and not disproportionate to the value of the services rendered. *Id.* 305
3. Allowance of Attorneys' Fees.—The amount allowed for counsel fees, against the estate of an infant, will not be increased on account of the number of attorneys engaged, but, the court will fix a sum for payment for the necessary legal services rendered, and apportion it between the attorneys, as may be equitable. *Id.* 305
4. Payment of Attorneys' Fees.—Where attorneys defend an action for wards, by contract with the guardian, and the guardian pays them, he will be allowed credits in his settlement

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- by the sums paid, if the services of an attorney were reasonably necessary, and the sums paid were reasonably proportionate to the value of the services, but, in the event the guardian fails to pay for the services, the attorneys may subject the estate of the wards to the satisfaction of their debts, by a suit in equity, in which all the parties, in interest, are made parties. *Id.* 305
5. Authority to Expend Property of Ward.—A guardian may apply to a court of equity for authority to expend property of the ward, and if the facts authorize it the court has jurisdiction to direct it to be made. *Watson v. Watson, Gdn.* 516
6. Use of Ward's Income.—Where a ward is unable to labor for his support on account of his extreme youth, and it is shown that it is necessary to expend the whole of his income—which amounts to \$58.75 per month—for his support and education, the chancellor may direct and authorize the guardian to expend that amount for such purposes until the further orders of the court. *Id.* 516

HARMLESS ERROR—See Appeal and Error.

HOMESTEAD—See Deeds—

1. Abandonment of by Widow—Deeds.—A widow who sells and attempts to convey her homestead right in the lands of her deceased husband, abandons the same and her grantor takes nothing by the deed. *Toblen v. Gentry* 80
2. Innocent Purchaser.—One is not an innocent purchaser of land for value who knows the fact that there are unknown heirs, or who is confronted by a deed in his chain of title specifically reciting that the widow's homestead right alone is conveyed. *Id.* 80
3. Election by Widow.—In the absence of any assignment of dower or homestead, the law will presume that the widow elected to take that estate which was most beneficial to her and her children, and when the homestead fills that description, a number of years' occupancy by the widow without any such assignment will be conclusively presumed to be an election by her to take homestead rather than dower. *Campbell v. Whisman* 256
4. Sale of Right by Widow—Effect.—Since the right of homestead of a widow in the land of her husband is not an estate, but only a right of occupancy, an attempted sale by her of such right conveys nothing and has the effect of forfeiting such right in favor of the owners of the land who have an immediate right or occupancy, and the attempted vendee becomes a hostile holder to the title as against them. *Id.* 256

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5. How Debtor Entitled to Homestead.—In order to entitle a debtor to a homestead exemption in real estate, of which he is the owner, seized for debt, he must be a bona fide house-keeper with a family in possession of, i. e., residing upon, the property, claiming it as a homestead when levied upon by the attaching or execution creditor; or if not in possession his absence must be temporary and with the fixed intention or purpose existing at the time of leaving it to return to and occupy the property as a homestead. Moreover, he must have acquired the property prior to the creation of the debt or demand to satisfy which it is sought to be subjected to sale. *Clay's Committee v. Washington* 756
6. Abandonment—Exemption.—Although the debtor may, after acquiring a homestead in real property, before the creation of the debt, leave it temporarily with the intention to return to and occupy it as a homestead, and even carry such intention into effect by later returning to and occupying the property, if after doing so he abandons it as a homestead and removes to and occupies another piece of property of which he is the owner, and which he acquired after the creation of the debt, with the intention to make it his homestead instead of the property from which he removed, in such event he will not be entitled to a homestead in either piece of property as against the debt of the creditor, and both may be subjected to its payment, unless the second piece of property was purchased with the proceeds of the sale of the first property, in which event it would be exempt from the debt if worth no more than \$1,000.00; but if worth more than that sum, only \$1,000.00 of its value would be exempt to the debtor. *Id.*.... 756
7. Evidence.—Evidence in this case examined: Held, that the debtor, a woman, is not entitled to a homestead in either of the two lots levied upon and sold in satisfaction of the debt of the execution creditor. *Id.* 756

HOMICIDE—See Criminal Law—

1. Involuntary Manslaughter—Instructions.—Where one accused of manslaughter is convicted of involuntary manslaughter, the instruction upon voluntary manslaughter, even if erroneous, is not prejudicial to the accused. *Held v. Commonwealth* 209
2. Involuntary Manslaughter—Instructions.—The mere fact that two different states of case described in the evidence, which separately constitute involuntary manslaughter are presented separately in two instructions is not prejudicial error, although it would have been better practice to combine the two into one instruction. *Id.* 209
3. Involuntary Manslaughter—Instructions.—Involuntary man-

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- slaughter at common law is where death unintentionally results to another from the doing of an unlawful act, or the doing of a lawful act in an unlawful manner, and not having been treated of by statute, is cognizable and punishable as a common offense in this state. *Id.* 209
4. Involuntary Manslaughter—Instructions.—An instruction submitting as an element of involuntary manslaughter, carelessness or negligence in the operation of an automobile upon a public street of a city within the business district and during business hours, is not erroneous but proper. *Id.*..... 209
 5. Self-Defense—Instructions.—An instruction on the law of self-defense so worded as that it might have given, or was reasonably liable to give, the jury to understand, that in order to acquit the accused on that ground, they were required to believe from the evidence beyond a reasonable doubt the facts it was stated would excuse the homicide; and which, in addition, confined the exercise of the right of self-defense by the accused to the mere shooting and wounding of the deceased, was so prejudicial to the substantial rights of the accused as to compel the reversal of the judgment of conviction. *Reynolds v. Commonwealth* 375
 6. Self-Defense—Instructions.—The instruction should have advised the jury that their belief from the evidence of the predicated facts constituting self-defense on the part of the accused, would justify a finding from them that the killing of the deceased was excusable; as in such state of case, the shooting by the accused was justifiable whether it resulted in the mere wounding of the deceased or in his death. A form of instruction which will correctly advise the jury as to the law of self-defense, on a retrial of the case, will be found in the opinion. *Id.* 375
 7. Drunkenness—Evidence.—Evidence of drunkenness upon the part of one accused of murder, even where malice is proven, is admissible as part of the *res gesta*, for consideration of the jury in determining whether the punishment should be death or only imprisonment, but it can not reduce murder to manslaughter where pre-existent malice toward the deceased is proven, and may have that effect where there is no proof, but merely a legal presumption, of malice. *Harris v. Commonwealth* 542
 8. Drunkenness—Evidence.—An instruction upon manslaughter is not authorized by evidence of drunkenness upon the part of the defendant who killed without justification one against whom he is conclusively proven to have entertained a settled ill will or malice. *Id.* 542
 9. Voluntary Manslaughter—Plea in Bar.—Where one of two persons, jointly indicted for the crime of willful murder, is found guilty of voluntary manslaughter, the other defendant can not

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- plead that judgment in bar of the right of the Commonwealth to try him for murder, even though the one first convicted fired the fatal shot and the second defendant was only present aiding and abetting. *Bingham v. Commonwealth*..... 688
10. Manslaughter.—Where two persons are jointly indicted for the crime of willful murder, one may be guilty of murder and the other of manslaughter only. If the one who fires the shot which causes the death acted in sudden heat of passion or in sudden affray and without previous malice, he will be guilty of manslaughter only, while the other who did not fire a shot but was present, aiding, encouraging and abetting the crime, will be guilty of willful murder, if he acted with malice aforethought. *Id.* 688

HOURS OF SERVICE ACT—See Master and Servant.

HUSBAND AND WIFE—See Divorce; Dower; Fraudulent Conveyances—

1. Alimony.—If a husband abandons his wife without a legal reason for so doing, he may be required to pay alimony. *Kelly v. Kelly* 172
2. Abandonment.—Mere fits of ill temper and occasional quarreling and scoldings by the wife, will not justify a husband in abandoning his wife, unless his personal safety is endangered. *Id.* 172
3. Alimony.—A wife will not be denied alimony, where she is not guilty of any moral delinquency, and her husband has abandoned her, although she is not entirely blameless, if the husband was a participant in the causes of the shortcomings, which led to the separation. *Id.* 172
4. Alimony—Discretion of Chancellor.—The amount of permanent alimony to be allowed a wife, because of desertion by her husband, is confided to the sound discretion of the chancellor, who may take into consideration, the amount of the husband's estate, his present and future prospects, his earnings and ability to earn money; his dependents, in the way of children, and the particular cause of the separation. *Id.*..... 172
5. Guaranty and Suretyship.—A married woman can not be bound, as a surety, and the only way she can undertake "to answer for the debt, default or misdoing of another," is to set apart her estate "by deed of mortgage or other conveyance," for the purpose of securing the payment of the liability. *Bryant v. Jones* 298
6. Guaranty and Suretyship.—A married woman will not be bound for the debt of her husband, despite the form of the transaction, if the substance of it shows, that it is a mere assumption of the husband's debt. *Id.* 298
7. Guaranty and Suretyship.—A married woman, who makes

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a promise to pay a debt, of her husband, in consideration of the sale and conveyance to her by the husband of a sufficient portion of his property to constitute a substantial consideration for the promise, and sufficient to induce it, will be bound by the promise, as such a transaction is not within the spirit and purpose of the prohibition of section 2127, Kentucky Statutes. *Id.* 298

IMPROVEMENTS—See Life Estates.

INADEQUACY OF PRICE—See Judicial Sales.

INDICTMENT AND INFORMATION—See Perjury—

Sufficiency of.—Except in cases where some special technical averment is required an indictment will be good if it gives the accused full and accurate information of the charge against him in language so simple that a person of ordinary intelligence can understand the nature of the accusation. *Blakey v. Commonwealth* 493

INFANTS—See Guardian and Ward; Judicial Sales; Parent and Child—

1. Sale of Land of Infant Under Statute.—In an action brought to obtain a sale of real property, inherited by infants from their father, to pay debts owing by the estate of the latter; and, also, to settle the estate, the proceedings must strictly conform to the provisions of Civil Code, sections 428-439. *Bennett v. Owen* 233
2. Sale of Land of Infant Under Statute.—Where in an action for the sale of infants' real property for the payment of the debts of an ancestor and to settle the latter's estate, the judgment, ordering the sale of the real property failed to fix or declare the amount of the debts, determine whether the property was or not divisible, or to provide, in case a sale of the whole should be necessary to pay the debts, what disposition should be made of the surplus proceeds, if any, arising from the sale and at a sale subsequently made of the property by the court's commissioners, more of it was sold than required to pay the decedent's debts, such judgment and the sale made thereunder were and are void as to the infants, and, by reason thereof, subject to collateral attack in an action brought by them to recover the land of the purchaser at the decretal sale and his vendee. *Id.* 233
3. Estoppel as Applied to Infants.—The doctrine of estoppel applies to infants the same as to adults; and where one appears to be and represents himself as being twenty-one years of age, and induces another in good faith to believe him of age and to purchase his land, the infant will be estopped from relying upon his infancy to defeat the deed. *Adkins v. Adkins* 662

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4. Action by Parent for Injuries.—A parent may recover of an employer of his infant child for any damage which the infant might suffer on account of injuries received while the child is engaged in a dangerous or hazardous employment to which the employer assigns it, provided the employer knew that the child was an infant, or could have known it by the exercise of ordinary care and the employment was made without the knowledge or consent of the parent. *Ballard v. Smith*..... 705
5. Actions for Injuries—Liabilities of Employer.—For the employer to be liable in such cases he must either put the infant at a dangerous or hazardous employment, or consent for him to be so engaged and acquiesce therein, and if the infant is placed at a safe and non-hazardous employment and without the knowledge or consent of the employer voluntarily engages for the time in a hazardous employment without the employer's knowledge or consent, the latter will not be liable to the parent for any injury which the infant might sustain. *Id.*..... 705
6. Damages—Measure of.—The measure of damages in such cases is the value of the infant's services from the time of the injury until he shall arrive at twenty-one years of age, together with the expenses incurred for medicine and medical treatment. *Id.* 705

INHERITANCE TAX—See Abatement and Revival; Taxation.**INJUNCTION—See Taxation—**

1. Grantor and Grantee—Suit by Third Person to Quiet Title—Payment of Purchase Money Into Court—Right to Compel.—A grantor of minerals, under a deed containing a covenant of general warranty, who when sued by another to quiet his title to the minerals presented various defenses, and asked that his grantor interplead and defend the title, was not entitled to a mandatory injunction requiring his grantor to pay the purchase money into court pending the settlement of title. *Shepherd v. Laviers* 246
2. When Granted.—An injunction will not be granted unless it clearly appears that the complaining party will, unless it be granted, suffer great and irreparable injury that can not be adequately ascertained or compensated for in a suit for damages. *Newton v. Farris* 288
3. Will Not Be Granted to Interfere With Pending Forcible Detainer Proceedings.—Where "A" instituted forcible detainer proceedings against "B" and "B" traversed the finding against him, "A" in a suit afterwards brought by him should not have an injunction to restrain "B" from using the premises in controversy in the forcible detainer proceedings. *Id.*..... 288

INNOCENT PURCHASERS—See Homestead.

INSANE PERSONS—See Criminal Law.

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INSTRUCTIONS—See Appeal and Error; Carriers; False Imprisonment; Homicide; Trespass; Trial.

INSURANCE—

Accident Insurance—

1. Accident Insurance—Trial by Court—Finding of Facts—Sufficiency—Conclusion of Law.—In a suit on an accident policy, the trial court's finding of fact, that decedent's hernia was suddenly enlarged, was not sufficient to support the conclusion that the enlargement of the hernia was due to bodily injuries effected through external, violent and accidental means. *Transsylvania Casualty Insurance Co. v. Allen's Admr.* 117
2. Life Insurance—Forfeiture—Waiver.—Where a check for a premium was accepted on the condition that if it was not paid on presentation the policy should lapse, and the company treated the policy as lapsed only on the condition that the bank, on which the check was drawn, was not in error in refusing payment, it waived its right to insist on the forfeiture if, as a matter of fact, the payor had in the bank sufficient funds to meet the check, and the bank was therefore in error in refusing payment. *Inter-Southern Life Insurance Co. v. Cooke* 109
3. Accident Insurance—Pleading.—A demurrer was properly sustained to a petition which, as amended, sought a recovery under a limited accident policy, for the death of the insured from an accident alleged to have been sustained while engaged in farming, where the policy made a part of the petition did not insure against loss of life from such an accident but provided only for the payment of weekly indemnities for loss of time under certain conditions which were not asserted. *Harper's Admr. v. Southern Security Co.* 453

Fraternal Insurance—

4. Fraternal Insurance—Beneficiaries.—Previous to the enactment of the act of March 22, 1916, where the beneficiary in a policy of insurance issued by a fraternal benefit society, died, during the lifetime of the insured, and the insured did not, thereafter, make any further or other disposition of the fund to be paid under the policy, and in the absence of anything, in the contract of insurance, which made any other disposition of the fund, then to the beneficiary named, the fund, upon the death of the insured, descended to the heirs of the deceased beneficiary. *Bright v. Supreme Council of Catholic Knights and Ladies of America*, 388
5. Fraternal Insurance—By-law.—Previous to the act of March 22, 1916, concerning fraternal insurance companies, the constitution of the company, the laws of the state and the terms of the contract, fixed the rights of the parties and determined

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the disposition of the insurance fund, to be paid under the policy, at the time of the making of the contract of insurance, and after the contract of insurance was made, neither a by-law of the society, nor an act of the General Assembly can divest one of a vested right, which he acquired under the policy. *Id.* 388

6. Fraternal Insurance—Beneficiaries.—As a general rule, a beneficiary of a certificate in a fraternal benefit society, has only a contingent interest, which does not become vested until the death of the insured, and if he dies, before the insured, his right dies with him, and such is the rule declared by the act of March 22, 1916, to hereafter prevail in this state, but, heretofore, by the terms of sections 4841 and 655 Ky. Stats., the rule has been held to have been abrogated, and under contracts of insurance made previous to March 22, 1916, if the beneficiary died before the insured, and the insured, thereafter, made no further disposition of the fund to be paid under the certificate, and there was no provision of the contract, which provided for any other disposition of it, than to the named beneficiary, the right of the beneficiary was held to be vested, and while the insured might divest the right of the beneficiary by his act, the society could not do so. *Id.* 388

Life Insurance—

7. By-Laws Attached to Application—Evidence.—Section 679 of the Statutes requiring applications, by-laws and other documents (or copies thereof) referred to in a policy of insurance to be attached thereto and forbidding the introduction of such documents as evidence in any action upon the policy unless so attached does not apply when the policy makes no reference to such application, by-laws or other documents. *Western & Southern Life Ins. Co. v. Weber* 32
8. By-Laws Attached to Application.—Neither do the provisions of section 656 of the Statutes require such documents to be either attached to or contained in the policy, since that section treats of and relates only to rebates. *Id.* 32
9. Application for Life Insurance—Evidence.—Evidence that a girl about grown lived in the home with her mother during the time that her mother's menstrual periods ceased, and while her mother was ill and died of pulmonary tuberculosis, is some evidence that the daughter knew the statement she made in an application for life insurance that her mother died of "change of life" was not true. *National Council of Knights v. Dean* 43
10. Payment of Debts Out of Proceeds.—Where a testator in his will directed the payment of certain debts out of the proceeds of a life insurance policy which was at the time payable to

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his estate, and in the will stated that he would assign the policy to his son, which he afterwards did, the policy will be held by the son burdened with the trust for the payment of the debts specified in the will. *Watson v. Watson*, Gdn..... 516

INTENTION—See Escheat; Statutes; Wills.

JOINDER—See Actions.

JOINT OWNERS—See Partition.

JOINT TORT FEASORS—See Torts.

JUDGMENT—See Appeal and Error—

1. **Setting Aside Default Judgment.**—The setting aside of a default judgment, at the same term, at which it is rendered, is a matter, within the judicial discretion of the court, and is not governed by the provisions of the Code, which relate to the granting of a new trial, after the term, at which the judgment was rendered, upon the grounds of casualty or misfortune. *Sallie J. Thompson v. First National Bank's Receiver*; *J. M. Thompson v. First National Bank's Receiver*..... 69
2. **Setting Aside Default Judgment.**—The principle which should guide the judicial discretion of the court, in setting aside a default judgment, at the term at which it was rendered, is the determination as to whether the ends of justice will be subserved, unless the laches of the applicant have been such as will in justice close the ear of the court. *Id.*..... 69
3. **Collateral Attack—Jurisdiction.**—A judgment rendered in a court of general jurisdiction cannot be collaterally attacked unless the want of jurisdiction affirmatively appears in the record. *Taylor v. Asher* 563
4. **Collateral Attack.**—Where the record shows that infants under 14 years of age were summoned by service upon their custodian, which was in accordance with section 52 of the Civil Code, if the father was dead or a non-resident of the state, and it does not appear from the record that he was alive and a resident of the state, the judgment is not void and cannot be collaterally attacked. *Id.* 563
5. **Personal Judgment.**—A judgment, which may be enforced by an execution of fieri facias, is a personal judgment for the recovery of a fixed sum of money, or for interest and costs, therein or either. *Kelley v. Kelley* 576
6. **Conflicting Judgments.**—Where there are two conflicting judgments rendered by the same court, upon the rights of the same parties, growing out of the same contract, that which is later in time will prevail. *Cummins v. Mullins*..... 666
7. **Actions at Law—Suits in Equity.**—"A judgment given against

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- a plaintiff on the single ground that he has mistaken his remedy or form of action is no bar to his subsequent action brought in proper form." *Taylor v. Wilson*..... 695
8. Court of Continuous Sessions—Power Over Judgments.—A circuit court of continuous sessions has the same power over its judgments, in actions at law, for sixty days after their relation, as other circuit courts have over their judgments during the term, at which they are rendered. *Thompson v. Porter* 848
9. Court of Continuous Sessions—Power to Vacate or Modify Judgment.—A circuit court, of continuous sessions, after sixty days have elapsed from the rendition of a final judgment, has no power to set aside, modify or vacate its judgments, except upon the same character of proceedings and for the same reasons, that other circuit courts are authorized to disturb their judgment, after the term had ended, at which they were rendered. *Id.* 848
10. Vacation of Judgment.—If a judgment is void, the court, which rendered it, may vacate it, upon motion, after the term, at which it was rendered. *Id.* 848
11. Default Judgment.—Where a court has jurisdiction of the parties to an action, and the subject matter of the action, and the parties are free from disabilities, a default judgment regularly rendered, which is within the pleadings and prayer of the petition, is not void. *Id.* 848

JUDICIAL SALES—

1. Inadequacy of Price.—Mere inadequacy of price is not sufficient to set aside a decretal sale of property, but where the price bid is greatly disproportioned to the actual value, only slight additional circumstances are required to order a resale. *Carter v. Howard* 356
2. Exceptions—Infants.—Where rights of infants are involved the court will be more liberal in sustaining exceptions to commissioners' reports on the ground of gross inadequacy of price. *Id.* 356
3. Notice.—Under the Civil Code of Practice, sec. 696, unless the order otherwise directs, notice of sale under order of court shall be made at the door of the court house of the county. *Id.* 356
4. Notice.—Where the judgment directed posting of notices at the door of the court house and in the vicinity of the property to be sold, and also a publication in a newspaper, it was necessary that the directions of the judgment be complied with, publication in the newspaper alone being insufficient. *Id.* 356
5. Notice.—Where the report of sale recites that the property is advertised as directed by the judgment there is a presumption that the commissioner performed his duty, but this pre-

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- sumption may be rebutted by testimony showing the notices were not posted as required by the judgment. *Caudle v. Luttrell* 551
6. Collateral Attack.—A separate action instituted after the term at which a judicial sale of real estate is reported and confirmed, by parties defendants to the action in which the sale was ordered and confirmed, who knew of the sale before confirmation, but did not file exceptions thereto, to set aside the sale and confirmation thereof, is a collateral attack thereof, unless brought under some provision of section 518 of the Civil Code, and can not be maintained unless the judgment of confirmation is absolutely void. *Id.* 551
7. Irregularities in—Confirmation—Exceptions.—Mere irregularities or errors in the advertisement and appraisal do not render the sale or confirmation thereof void, but voidable only, and to be available must be taken advantage of by exceptions filed to the report of the sale. *Id.* 551
8. Appraisement—Coercive Sales—Sales for a Division of Proceeds.—The statute requiring an appraisement applies to all coercive sales for the payment of debts, but does not apply to sales of land made under section 490, Civil Code, for a division of the proceeds. *Lisle's Admr. v. Lisle*..... 656
9. Appraisement.—Where the principal purpose of an action was to obtain a sale of land that descended to a widow and an infant heir on the ground of joint ownership and indivisibility, under section 490, Civil Code, as amended by the act of 1916, and the court had jurisdiction to order a sale on that ground, the fact that a settlement of the estate of the decedent and the payment of his debts were asked as mere incidents to the main relief sought, did not make the sale coercive in character, so as to require an appraisement of the property. *Id.*... 656

JURISDICTION—See Appeal and Error; Judgment.

JURY—See Appeal and Error.

LANDLORD AND TENANT—

1. Liability for Tenant's Injury.—The landlord is not liable for injuries growing out of the defective condition of the premises, unless such condition is known to the landlord and is not known to, or discoverable by, the tenant on a reasonable inspection, and the landlord conceals, or fails to disclose, such condition to the tenant. *Speckman v. Schuster*..... 326
2. Liability for Tenant's Injury.—Where the defective condition of an attic floor was known to, or discoverable by, the tenant on a reasonable inspection the tenant could not recover for injuries caused thereby, even though she did not know of the existence of a stairway underneath the flooring, and fell

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- further than she had reason to anticipate she would fall if the flooring gave way, since the liability of the landlord turns on the fraudulent concealment of a latent defect and not on the tenant's full appreciation of the danger. *Id.* 326
3. Lease—Oil.—A lease of land for five years, or longer if found profitable, for the purpose of drilling for oil and gas, made for the recited consideration of \$1.00, cash in hand paid, and certain royalties on the oil or gas produced, and which provides that the lessee shall begin operations within a year and, in the event of his failing to do so, that he shall pay during the period of delay an annual rental of twenty-five cents per acre on the land, is not a unilateral contract. *Hughes v. Parsons* 584
4. Lease—Oil.—The main consideration to the lessor for the making of such a contract is the development of the property and payment to him of the promised royalty, and to the lessee it is the profits to be realized from the development of the property. Consequently the contract does not permit the lessee, in opposition to the wishes of the lessor, to delay the development of the property for an unreasonable time and thereby extend the lease indefinitely by the payment of a nominal annual rental. In case of unreasonable delay by the lessee in beginning operations under the lease after the first year, the remedy of the lessor is to notify the lessee that he will not accept further payment of the annual rental and permit his land to remain idle, but will require the lessee to at once begin, in good faith, performance of the contract; and if after such notice and demand, the lessee does not begin the development of the property within a reasonable time, the lessor may have the lease forfeited, resorting to a court of equity for that purpose. *Id.* 584
5. Lease.—Evidence examined and held insufficient to show that the lease sought to be cancelled was obtained by fraud on the part of the lessee. *Id.* 584

LAW OF THE CASE—See Appeal and Error.

LAW OF THE PLACE—See Dower.

LEASE—See Estoppel; Landlord and Tenant; Mines and Minerals; Taxation; Vendor and Purchaser.

LEGACIES—See Wills.

LEGITIMACY—See Marriage.

LICENSES—See Taxation.

LIENS—See Execution; Trusts.

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Improvements—Charge on Remainderman.—A life tenant, even though he may believe in good faith that he is the owner of the fee, is not entitled to a lien as against the remainderman, for the enhancement of the property by reason of his improvements, and the purchaser from the life tenant, though honestly believing that he acquired the fee, is entitled to no greater rights than the life tenant himself. *Scott v. Scott*.... 604

LIFE INSURANCE—See Insurance

LIFE TENANT—See Waste.

LIMITATION OF ACTIONS—See Adverse Possession—

1. Action to Recover Money Paid by Mistake.—An action to recover money paid through mistake, must be commenced within five years next after the cause of action accrues; and the cause of action shall not be deemed to have accrued until the discovery of mistake, or until it could, by the exercise of reasonable diligence, have been discovered; nevertheless no such action shall be brought ten years after the making of the mistake. *Griggs v. Levi*..... 182
2. Mistake.—The duty is upon the complainant to exercise reasonable diligence to discover the mistake, and if he fails to do so, an action by him will not lie after the expiration of the five year period. *Id.* 182
3. Mistake.—If a plaintiff allow the five year period to elapse before commencing his action, and thereafter attempts to rely upon the discovery of the mistake within five years next before the commencement of his action, it is incumbent upon him to both allege and prove, if denied, that the mistake was not only discovered within the five years next before the institution of the action, but that the mistake could not have been sooner discovered by him by the exercise of reasonable diligence on his part. *Id.* 182
4. Mistake.—Although it be alleged by plaintiff that the mistake was first discovered within five years next before the commencement of the action, and that it could not have been sooner discovered by him by the use of reasonable diligence yet his action will be dismissed if he fails to establish both of said allegations by proof, if they be denied. *Id.*..... 182
5. Mistake.—The presumption will be indulged, in the absence of a showing to the contrary, that the mistake was discovered by the party against whom it was made immediately following its occurrence. *Id.* 182
6. Adverse Possession.—In such a case fifteen years' adverse holding will bar the right of the holder of the fee unless he was laboring under disability at the expiration of the fifteen years, which, if true, he has three years thereafter

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- in which to file suit (sec. 2506 Ky. Statutes), and not fifteen years from the time of the removal of such disability (sec. 2525 Ky. Statutes). *Campbell v. Whisman*..... 256
7. Pleading.—The statute of limitation in order to be taken advantage of must be pleaded. *Johnson v. Johnson*..... 421

LOGS AND LOGGING—

1. Timber Contract—Action for Deficiency—Evidence—Sufficiency.—In an action for deficiency upon a sale of timber, evidence examined and held that the jury's finding in favor of the defendant was not flagrantly against the evidence. *Burnside Excelsior Co. v. Bryant*..... 186
2. Timber Contract—Action for Deficiency—Evidence—Admissibility.—In an action for deficiency upon a sale of timber, where no question of title was presented, evidence as to how much timber had been cut and how much remained on the lands of the defendant, was not inadmissible on the ground that the witnesses were permitted to prove the defendant's title by parol evidence. *Id.* 186
3. Contracts—Construction.—Defendants purchased plaintiff's timber at the price of \$3.50 per thousand feet, with the right to remove it within five years. Needing money, plaintiff offered in writing to reduce the price 50c per thousand feet, and requested defendants to send him \$500.00. In reply, defendants enclosed a contract and wrote plaintiff that upon his signing the contract, they would pay him \$500.00 more on the timber. Thereupon, plaintiff and defendants entered into a written contract by which plaintiff agreed to accept \$3.00 per thousand for the timber, in consideration of defendants making a further advance to him of the sum of \$500.00; held, that the consideration for the reduction of the price was not the payment of the \$500.00, but the payment of that sum in advance, with the understanding that it was to be credited on the purchase price of the timber. *Johnson v. Broughton* ... 628
4. Floating Tide—Expert Testimony.—In an action on a logging contract, the opinions of experienced log men who had a special knowledge of the subject and were present and observed the streams on the occasion in question and stated the facts on which their conclusions were based, that a particular tide was not a "floating title" were admissible in evidence, the subject not being one of such common knowledge that the jury upon hearing the facts could have formed a reasonable opinion for themselves. *Kentucky River Timber & Coal Co. v. Mosely* 696
5. Floating Tide—Evidence—Estoppel.—Where under a logging contract plaintiff was given one more "floating tide" to float logs, the determination of the question was not left to the

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plaintiff, but the question whether a particular tide was a "floating tide" was one of fact, and plaintiff, who after making a diligent effort to float the logs on a particular tide found that the tide was not sufficient, was not precluded by his contract, which in no wise prejudiced the rights of the defendant, from asserting that the tide was not sufficient. *Id.* 696

LOOKOUTS—See Railroads.

MANSLAUGHTER—See Homicide.

MANUFACTURES—See Taxation—

1. Meaning of Word.—In the meaning of the statute exempting "raw material on hand for the purpose of manufacture" raw material is not on hand for the purpose of manufacture unless the manufacture of such raw material at the plant where it is found is so complete as that the product may be sent out from that plant and sold on the market as a finished product. *Lorriard Co. v. Ross, Sheriff*..... 217
2. Definition of.—It is not the means or methods employed nor the nature or number of processes resorted to or the size of the factory or the number of hands it employs or the volume of machinery in use, but the result accomplished that determines whether the article is manufactured or not. *Id.*..... 217

MARRIAGE—See Husband and Wife—

Marriage of Slaves—Legitimacy.—Society as well as the statutory law of this state recognized the validity of customary marriages among slaves before the Civil War, and where a colored man and woman by the custom of times, were recognized as husband and wife, lived as such, and raised a family, the issue of the marriage will be regarded as legitimate and entitled to inherit from their ancestors, even though no certain or specific form of marriage ceremony was performed and no witness testifies to having witnessed the ceremony. *Tobien v. Gentry* 80

MASTER AND SERVANT—See Carriers; Railroads—

1. Employment of Infant in Violation of Statute.—If a master employs a servant contrary to the provisions of the child labor law (sec. 331a, Ky. Statutes) he is liable for all damages sustained by the infant having a causal connection with his employment, and this liability is not relieved by the infant servant misrepresenting his age at the time of the employment, although the master believed such representations and engaged the servant in good faith upon that belief. *Sanitary Laundry Company v. Adams* 39

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2. Appliances—*Res Ipsa Loquitur*.—The doctrine of *res ipsa loquitur* is not applicable between master and servant unless there is other evidence, however slight, of some negligence of the master; nor would it apply even then where the injured servant was operating and had charge of the defective appliance or contrivance which produced the accident, and whose duty it was to inspect or repair or notify the master of the defects. *Mountain Central Railroad Co. v. Drake's Admr.* 135
3. Negligence—Appliances.—Before a master can be held liable to his servant there must be some evidence to show negligence on his part, and there can be no negligence without the violation of some duty. Where it is the duty of the servant to inspect and repair the machinery, or notify the master of the defects, the latter is not in fault until he has received such notification, and if the servant fails to inspect or repair or notify the master, and continues to work, he will be deemed to have assumed the risk and can not recover from the master for any injuries sustained. *Id.* 135
4. Assumption of Risk.—A servant was employed to operate a stationary boiler and engine, having complete charge of it. He was an experienced man and had operated the machinery for seven or eight years. Under the terms of the employment he had complete control of it and it was his duty to repair it or to notify the master of necessary repairs. No such notification was given and the boiler exploded, killing the servant. Held that the master was not liable, since the risk was assumed by the servant. *Id.* 135
5. Workmen's Compensation Act—Participation in Compensation.—Under the Workmen's Compensation Act a partially dependent father of a decedent employe may participate in the compensation, allowed by the board, with the wife of the deceased whom the law presumes to be wholly dependent, in that proportion which the partial dependency of the father bears to total dependency. *Penn v. Penn.* 228
6. Workmen's Compensation Act—Award.—The underlying purpose of the system instituted by the Workmen's Compensation Act is to provide support, and maintenance for those who were dependent totally or partially upon the deceased employe in his lifetime, and to accomplish this the award made by the board should be distributed among the several dependents, total and partial, in the same proportion, as nearly as may be, that the deceased employed in taking care of the several dependents. *Id.* 228
7. Fellow Servants—Negligence.—Employes in control of separate coal cars in a coal mine and performing the duty of driving the mules by which they are hauled, are not fellow servants of other employes of the same master in control of like cars in the same coal mine and performing the duty of

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- driving the mules hauling them; and if a servant in control of one of such cars and engaged in driving the mule hauling it, is injured by the negligence of a servant in control of another car and engaged in driving the mule hauling it, the master will be liable. *R. C. Tway Mining Co. v. Tyree*..... 248
8. Fellow Servants—Negligence.—The master will not be excused for negligence resulting in injury to one servant inflicted by another servant in the same department of service and engaged in like work, unless the servants are so engaged and situated as that each, by ordinary care and attention in the performance of his duties, may protect himself from injury resulting from the negligence of the other. *Id.*..... 248
9. Fellow Servants—Negligence.—Where the servant is injured by another servant of the same master, who is not directly associated with him or in any degree subject to his control, or even advice, and against whose negligence he has no means of protecting himself, he may recover of the master damages for the injuries caused him by the negligence of such other servant, whether such negligence be ordinary or gross, and without reference to the position or place the servant causing the injury holds. *Id.* 248
10. Servant—Dangerous Instrumentality—Electric Wires.—Where linemen are not entrusted with the control and generation of electricity, but are entrusted merely with bundles of wire for use in making repairs, such bundles of wire are not dangerous instrumentalities, within the rule requiring the master to exercise a proper degree of care to guard, control and protect dangerous instrumentalities owned or operated, by him, and to respond in damages for an injury caused by improper use of such instrumentalities by a servant, though not then engaged in performing his duties. *William Craig's Admx. v. Ky. Utilities Co.; George Craig v. Ky. Utilities Co.* 274
11. Liability for Injuries to Servant.—One who is engaged to shovel dirt from a ditch and over exerts himself and is injured, can not recover damages of the master because the servant is the best judge of his physical strength. *Central Kentucky Gas Co v. Cantrell* 291
12. Liability for Injuries to Servant.—The fact that the master assured the servant that he could lift the dirt from the bottom of the ditch and cast it upon the surface of the ground and that the servant, though protesting, returned to the work and was injured by overtaxing his strength, does not further the cause of the servant for the reason that the servant is better able to judge his own strength than is the master to judge the strength of the servant. *Id.* 291
13. Care to be exercised for Safety of Another.—Where a duty rests upon one to exercise care for the safety of another,

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- and although slight injury may be unavoidable, the duty is encumbent upon him, not to inflict any greater injury, than is unavoidable, although the injured one, himself, may have been negligent. *P. Bannon Pipe Line Co. v. Battle's Admr.*..... 367
14. Assumption of Risk—Contributory Negligence.—It is the duty of a master to be reasonably careful to prevent accidents and injuries to his servants, and his failure to do so, will render him liable, unless the servant assumes the risks or contributes to the injury, by his negligence. *Id.*..... 367
15. Hours of Service Act.—A section hand sweeping snow from the switches in a railroad yard is not an employe within the Hours of Service Act, which applies only to persons actually engaged in or connected with the movement of trains. *Jones v. Louisville & Nashville R. R. Co.*..... 409
16. Hours of Service Act.—Sweeping snow from a switch in a railroad yard has no connection with the movement of trains under the act of Congress of March 4, 1907. *Id.*..... 409
17. Personal Injuries—Evidence.—When a verdict for personal injuries is so large that it can be sustained only if the injuries are permanent, there must be positive and satisfactory evidence of permanency. *Illinois Central Ry. Co. v. Basham*..... 439
18. Constitutional Law—Workmen's Compensation Act—Validity.—Notwithstanding section 241 of the Constitution, providing that whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, damages may be recovered for such death, and until otherwise provided by law, the action to recover such damages shall be prosecuted by the personal representative of the deceased, a servant may voluntarily accept provisions of the Workmen's Compensation Act, fixing the amount of recovery in case of death. *Penn's Admr. v. Bates & Rogers Construction Co.* 529
19. Workmen's Compensation Act—Action for Damages—Rights of Servant.—Since the Workmen's Compensation Act provides for compensation for death in lieu of all other liability, an administrator of a deceased servant, who had accepted the provisions of the act, cannot maintain an action for damages. *Id.* 529
20. Safe Place to Work—Assumption of Risk.—While it is the duty of the master primarily to exercise reasonable care to provide the servant with a safe place in which to work, and with safe tools, appliances and materials with which to work, the negligence between the master and servant must be measured by the character and inherent dangers of the work engaged in, and in accepting an employment the servant assumes all the ordinary and usual risks which are incident to the work, which arise from a known and obvious danger. *Turner Day & Woolworth Handle Co. v. Allen* 531
21. Negligence—Liability.—The master is not an insurer of the

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- safety of the servant, but, is liable, only, for injuries suffered by the servant by reason of the master's negligence. *L. & N. R. R. Co. v. McIntosh* 571
22. Assumption of Risk.—The servant assumes all the ordinary risks, incident to the work, in which he is engaged. *Id.*..... 571
23. Workmen's Compensation Act.—In holding that the compensation for specific injuries, provided in section 18 of the Workmen's Compensation Act, was confined to those injuries and no others, it was not intended to lay down the rule that the Workmen's Compensation Board could not use the schedule contained in section 18 as a standard by which to measure the compensation to be allowed for injuries not specified, but falling within the general clause awarding compensation, "in all other cases of permanent partial disability," etc. *Nelson v. Kentucky River Stone & Sand Co.*..... 583
24. Assumption of Risk.—A trackman working for an interstate railroad and engaged in interstate commerce, who is injured by flying slivers of steel which come from a common chisel or clawbar, though defective, with which he is working, assumes the risk of danger therefrom, and is not entitled to damages, although the suit be prosecuted under the Federal Employers' Liability Act. *Donahue v. Louisville, Henderson & St. L. Ry. Co.* 608
25. Simple Tool Rule.—A spikemaul, T rail, chisel and clawbar are common tools governed by the simple tool rule, as announced by this court. *Id.*..... 608
26. Defective Appliances—Assumption of Risk.—One who uses without complaint or an assurance of safety from the master, defective common tools with which he is injured, assumes the risk of danger from such defective common tools, and the company may successfully interpose the plea of assumed risk; such conduct is not contributory negligence on the part of the employe but assumed risk and is only a defense in cases where the Federal Safety Appliance Act does not cover the tool or instrumentality causing the injury. *Id.*..... 608
27. Assumption of Risk—Contributory Negligence.—Contributory negligence is not a complete defense to an action for personal injury or death of an employe under the Federal Employers' Liability Act, but can be received only to reduce the recovery. Assumed risk is a complete bar to an action in cases where it can be invoked. *Id.*..... 608
28. Safe Place to Work—Assumption of Risk.—While it is the duty of the master to use ordinary care to provide his servant with a reasonably safe place to work and reasonably safe appliances for performing the work, he does not insure the servant's safety and is not liable for an injury sustained by him from a defect in the appliance furnished him for do-

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- ing the work, or that may result from the danger attending its performance, if such defect or danger is so obvious that it must have been known to a person of ordinary intelligence situated as was the servant. In such state of case the servant assumes the ordinary risks that attend the use of the appliance or performance of the work. *Crook v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*..... 615
29. **Assumption of Risk.**—It is a well known rule that a servant assumes the risks created by the method he voluntarily employs in performing the work required of him. As in this case the servant, a section hand, sustained the loss of a finger, while riding upon a railroad tricycle in performing a required duty, by attempting to manipulate a lever for stopping the tricycle, without looking to see where he was placing his hand, and thereby caused it to come in contact with the cogwheels of the machine; and the danger from such contact was so open and obvious as to have been known to him, the trial court was authorized to hold as a matter of law that his injuries were caused by his own negligence and on that ground to direct the jury to return a verdict for the appellee. *Id.*..... 615
30. **Negligence—Pleading.**—Where in an action for personal injuries the petition specifies the act or acts of negligence alleged to have caused the injuries, the plaintiff cannot on the trial of his case avail himself of any other act or acts of negligence, but is confined to the specifications of the petition. So in this case after alleging in the petition that his injuries were caused by the negligence of appellee in failing to provide a cover or guard for the cogwheels of the tricycle, appellant could not shift the ground of recovery by attempting to prove that appellee was negligent in permitting the use of a piece of wood near the cogwheels of the tricycle and failing to provide it with a cover or guard, and that his hand was injured by contact with it. *Id.*..... 615
31. **Negligence.**—A master having knowledge that the work required of a servant is liable to cause him some injury of which the servant does not know and failing to warn him of any danger, is liable for all the injurious consequences that are proven to have resulted from the negligence directly and without intervening cause, regardless of whether or not the master ought to have anticipated the particular consequences that did result. *L. & N. R. Co. v. Wright; Same v. Barr.*..... 634
32. **Servants' Torts—Scope of Employment—Petition—Sufficiency.**—Defendant's chauffeur was directed to take defendant's children to a church several blocks distant and then return to defendant's home. After taking the children to the church, he went to a gasoline station to procure gasoline. He was then only a block and a half from defendant's home. Instead of going home, he went to a place several blocks dis-

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- tant to attend to his own business. On his return journey he proceeded about two blocks when his machine collided with plaintiff's machine. He was then almost three times as far from defendant's home as he was when he started on his journey. Held, that the chauffeur was not acting for the defendant at the time of the accident, but was using the machine solely for his own purposes and the demurrer to the petition as amended was properly sustained. *Crady v. Greer* 675
33. Benefits Under Relief Department.—It is a condition precedent to the right to recover benefits under a relief department of the employer that the employe or his estate comply with the requirements and terms specified by said department. *Stewart, Admr. v. Wisconsin Steel Company* 730
34. Benefits Under Relief Department.—One violating the rules and regulations of a relief department is not entitled to recover any benefits thereunder, it being expressly provided that breach of the rules will bar the right to such benefits. *Id.* 730
35. Benefits Under Relief Department.—An employer proposing to give benefits to an employe has the right to fix the terms and conditions under which the employe may be entitled to receive such benefits. *Id.* 730
36. Safe Place to Work—Assumption of Risk.—It is the duty of the master to furnish the servant a reasonably safe place in which to perform his work, but if the place is unsafe and the danger in continuing the work is obvious and patent, the servant by continuing will assume the risk, and if injured, the master will not be liable. *Oyen v. Willings*..... 742
37. Reliance Upon Knowledge of Master.—If the master directs the servant as to the manner and method of performing the work, the servant has a right to rely upon the superior knowledge of the master and to assume that the performance of the work in the way directed will not be dangerous, unless the danger in performing it in that manner is so obvious and patent that an ordinarily prudent person would not undertake it, in which event the master will not be liable. *Id.*..... 742
38. Obvious Danger.—Where plaintiff with a heavy load on his shoulder undertook to cross over a rapidly moving belt about thirty inches high and ten inches wide, whereby he was thrown and sustained injuries, he can not recover of the master on the ground that he was directed to do so, since the danger in the undertaking was so obvious that a person of ordinary prudence and with due regard for his own safety would not have undertaken to carry out the directions of the master. *Id.*..... 742
39. Workmen's Compensation Act—Knowledge of Injury By "Foreman" or "Boss."—Knowledge of the injury by a "foreman" or "boss" will be the same as if the employer in person had knowledge. *Bates & Rogers Construction Co. v. Allen* 815

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40. Workmen's Compensation Act—"Knowledge of Injury"—What Is.—"Knowledge of the injury" as used in the statute is not answered by knowledge of an accident or that an employe "got it" with something. The knowledge that an employe has received an injury must be sufficient to give reasonable information to the employer of the nature of the injury. *Id.* 815
41. Workmen's Compensation Act—Written Notice of Injury—Sufficiency of.—A written notice of the injury must be sufficient to apprise the employer in a general way of the nature of the injury. *Id.* 815
42. Workmen's Compensation Act—Notice of Injury—What Will Excuse.—The failure to give notice may be excused by "mistake or other reasonable cause," and whether the mistake or other reasonable cause will excuse the failure to give notice is a question to be determined by the facts of the particular case. *Id.* 815
43. Workmen's Compensation Act—Notice of Injury "As Soon As Practicable."—The words "as soon as practicable" should be given a liberal construction so as not to defeat without just cause the compensation to which a meritorious claimant is entitled. *Id.* 815
44. Workmen's Compensation Act—Failure to Give Notice—What Will Excuse.—Where the employer is not prejudiced by the failure to give notice as soon as it might have been given and the failure to give it earlier was occasioned by an honest mistake on the part of the employe his claim should not be rejected on account of the delay in giving notice. *Id.*..... 815

MEASURE OF DAMAGES—See Contracts; Damages; Infants; Trespass.

MENTAL CONDITION—See Criminal Law.

MINES AND MINERALS—See Estoppel; Taxation; Vendor and Purchaser—

Sale of Mine—Action on a Lease—Claim of Abandonment—Claim of Worthlessness—Evidence.—In an action by the lessee of a coal mine to recover on the lease against a purchaser of the property covered by the lease, evidence examined and held insufficient to sustain the claim that the lease was abandoned, or that it was of no value. *Empire Coal Mining Co. v. Empire Coal Co.* 699

MISTAKE—See Limitation of Actions.

MONEY RECEIVED—See Limitation of Actions.

MORTGAGES—See Execution—

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Validity—Want of Consideration—Fraud—Finding—Evidence—Sufficiency.—In an action to enforce a mortgage lien, evidence examined and held insufficient to show want of consideration or to sustain a finding that the mortgage was obtained by fraud. *Ward v. Preston*..... 845

MOTOR VEHICLES—See Negligence.

MUNICIPAL CORPORATIONS—See Statutes—

1. Classification—Assignment.—Constitution, section 156, in providing for the classification of cities and towns confers upon the legislature the power to assign them to the classes, respectively, in which they should be placed, and after such assignment, when deemed necessary, to change or transfer them from one class to another. When this power has been exercised by the legislature in either particular, the courts must assume that it was properly exercised. *Town of London v. Brown* 63
2. Classification.—Where by an act of the legislature a city was assigned to the fourth class by specifically naming it with all others so named as belonging to that class, but by a subsequent legislative act amendatory of the first act, the name of the city was omitted in declaring the names of the cities composing the fourth class, such omission had the legal effect to make of it a town of the sixth class, because of the provision of the last section of the amendatory act by which it is declared "all other incorporated cities and towns not named in this bill shall belong to the sixth class." *Id.* 63
3. Taxation.—As by the act, *supra*, London was made a town of the sixth class, it was without power to levy the tax of 75 cents on the \$100.00 complained of in this case; for section 3704, subsection 3, Ky. Statutes, enacted to carry out the provisions of section 157, Constitution, prohibits a town of the sixth class to levy a tax in excess of 50 cents on each \$100.00 of property subject to taxation. Consequently, it was properly enjoined from collection of the tax of 75 cents on the \$100.00 it had levied. *Id.* 63
4. Construction of Streets—Closing to Travel.—A municipality has power and authority while constructing or reconstructing its streets, or any part thereof, to blockade and close the same to travel; and where such blockade is made by the erection of suitable barriers which, at night, are indicated by red signal lights in such way as to notify travelers, exercising reasonable care, that the street, or that part of it, is closed to travel, the city is not liable to a pedestrian who is injured by falling into an excavation so barricaded. *Tegtmier v. City of Covington* 312

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5. **Rights, Duties and Liabilities of Policemen—Arrest.**—A police officer who makes an arrest, without a warrant or other judicial authority, of a person who has not committed a public offense in or out of his presence, and who the policeman does not have reasonable grounds to believe has committed a felony, is not acting within the scope of his authority as an officer, and the surety on his official bond is not liable for the trespass. *Taylor v. Albert Shields, John J. Shore and Chicago Bonding & Surety Co.*..... 669

MURDER—See Homicide.**NEGLIGENCE—See Criminal Law; Damages; Master and Servant; Railroads; Telegraphs and Telephones; Trial—**

1. **Contributory Negligence.**—Contributory negligence does not bar a recovery, unless, but for the contributory negligence, the injury would not have been incurred. *P. Bannon Pipe Line Co. v. Battle's Admr.* 367
2. **Contributory Negligence.**—Contributory negligence does not bar a recovery, if the party, perpetrating the injury, was under a duty to exercise care and could have, by the exercise of ordinary care, averted the consequences of the injured one's negligence. *Id.* 367
3. **Contributory Negligence—Motor Vehicles.**—Operator of a motor truck not guilty of contributory negligence as a matter of law simply because as he approached a dangerous grade crossing after looking and listening he fixed his gaze upon the crossing, which was rough and in bad condition, in order to drive his truck across the railroad tracks or because he did not stop and look and listen. *L. & I. R. Co. v. Schuester.* 504
4. **Care to be Exercised at Dangerous Crossings—Instructions.**—While both the plaintiff and defendant at a dangerous crossing must exercise the same degree of care commensurate with the danger the defendant cannot complain of the failure of the instructions to place upon the plaintiff this degree of care where the court gave substantially the same instruction as plaintiff offered upon the question. *Id.* 504
5. **Contributory Negligence—Pleading—Submission to Jury.**—A plea of contributory negligence is an affirmative one and if not denied, the plaintiff, against whom it is charged, has no cause for submission to a jury. *L. & N. R. R. Co. v. McIntosh.*..... 571
6. **Actionable Negligence—Evidence.**—Where no injury ought to have been anticipated, as a matter of law there is no actionable negligence, because in the absence of some danger reasonably to have been anticipated there was no duty to warn, but when actionable negligence has been established the proximate results and amount of recovery depend upon the evidence of direct sequences and not upon the defendant's fore-

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- sight, and are for the jury. *L. & N. R. Co. v. Wright; Same v. Barr* 634

NEGOTIABLE INSTRUMENTS—See Bills and Notes.

NEW TRIAL—See Appeal and Error—

1. Newly Discovered Evidence—Sufficiency.—A new trial for newly discovered evidence was properly refused where the evidence was mainly cumulative and not of such a decisive character as to render a different result reasonably certain. *Inter-Southern Life Ins. Co. v. Cooke* 109
2. Grounds—Surprise—Necessity for Objection at Trial.—A reversal will not be granted on the ground of surprise, where there was no objection to the evidence alleged to constitute surprise, and no motion was made for the postponement or continuance of the case. *Id.* 109
3. Newly Discovered Evidence.—Where the issue upon a trial was whether the plaintiff was then suffering from systemic poisoning or tuberculosis, a petition for a new trial alleging that the defendant could prove by the attending physician of plaintiff who died three months after the trial, that he died of tuberculosis, but the witness did not know the duration or contributing causes of the disease, did not state newly discovered facts of such a decisive character on the issue tried as to authorize a new trial, and it was not error to sustain a demurrer thereto. *L. & N. R. Co. v. Wright; L. & N. R. Co. v. Barr, Admr.* 634

NEWLY DISCOVERED EVIDENCE—See New Trial.

NON-RESIDENCE—See Abatement and Revival.

NOTICE—See Judicial Sales; Master and Servant; Taxation.

OBSTRUCTING JUSTICE—See Contracts.

OFFICERS—See Arrest; Municipal Corporations; Pleading—

- ✓ 1. Compensation or Salary of—Constitutional Law.—Under sections 161 and 235 of the Constitution neither the compensation nor the salary of any public officer can be changed during the term for which he was elected. *Neutzel, Clerk v. Fiscal Court of Jefferson County* 1
- ✓ 2. Jefferson County Court—Increase of Fees of County Clerk—Constitutional Law.—An act of the legislature increasing the fees of the clerk of the Jefferson county court did not apply to the officer during the term the act was passed. *Id.* 1
3. Clerk of Jefferson County Court—Compensation of.—The compensation of the clerk of the Jefferson county court cannot

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- under any circumstances exceed seventy-five per cent of the amount collected and turned into the state treasury. Id..... 1
4. Fees of—Increase in for Benefit of State.—The legislature may increase the fees that may be charged for services performed by an officer and provide that the increase may be collected by the officer and turned into the state treasury. Id..... 1

OILS—See Landlord and Tenant; Taxation.

OMITTED PLEADINGS—See Appeal and Error.

OPTIONS—See Appeal and Error, 53.

ORDERS—See Appeal and Error.

PARENT AND CHILD—See Infants—

Guardian and Ward—Use of Ward's Estate.—While it is the duty of the parent to maintain, educate and support his child for whom he may be guardian, still, if the parent is in such needy financial circumstances as that he is unable to do so, he may use the ward's estate within the limits of the law for that purpose. *Watson v. Watson*, Gdn. 516

PAROL AGREEMENT—See Contracts.

PAROL CONTRACTS—See Frauds, Statute of.

PAROL EVIDENCE—See Deeds; Trusts.

PARTIES—See Assignments; Judgment.

PARTITION—

Sale of Property—Joint Owners.—Civil Code of Practice, section 490, provides that a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, though one of them is an infant, if the estate be in possession and the property cannot be divided without materially impairing its value or the value of plaintiff's interest therein. By act of 1916 (Acts 1916, chapter 119, page 707) section 490 was amended so as to authorize a sale, "if the estate shall have passed by devise or descent to the widow and heir or heirs of a decedent, and the widow shall have a life right in a portion thereof, either as a homestead or dower or by devise, and the said property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein." Held, that where land descends to a widow and a single heir, they are joint owners within the meaning of the Code as amended, and sale thereof on the ground of indivisibility is fully authorized. *Lisle's Admr. v. Lisle*..... 666

PASSENGERS—See Carriers.

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PATENTS—See Boundaries; Public Lands.

PAYMENT—See Guardian and Ward; Injunction.

PEDESTRAINS—See Railroads.

PERFORMANCE—See Deeds.

PERJURY—

1. False Swearing—Indictment—Negative False Statement.—
An indictment for false swearing must set out the statements
alleged to have been made and then aver that the statements
were false and were so known to be when made. *Blakey v.*
Commonwealth 493
2. False Swearing—Indictment—Sufficiency of.—It is only neces-
sary that the alleged false statement should be negatived in
such a way as to certainly inform the accused of the nature
of the offense which is charged against him and when the in-
dictment, after setting out the false statements, charges that
they were wilfully corrupt and false and were so known to be
when made, this is in substance the same as if the alleged
false statements were negatived in so many words. *Id.*..... 493
3. False Swearing—Indictment—Sufficiency of Averment as to
Matter Being Investigated.—It is not essential that the indict-
ment should set out the specific matter being investigated by
the grand jury at the time the alleged false testimony is given.
It is only necessary that it should state facts showing that
the matter being investigated related to a subject that the
grand jury had jurisdiction to inquire into. *Id.*..... 493
4. False Swearing—Evidence Sufficient to Convict.—The falsity
of the statement may be shown by the evidence of living wit-
nesses or by documentary or written evidence or by facts that
clearly and convincingly establish it. *Id.*..... 493
5. False Swearing—Evidence Sufficient to Convict.—Where a per-
son was indicted for falsely testifying that he had bought
whiskey at a certain time and place from a named person and
it was conclusively shown that the person from whom he said
he bought the whiskey was at the time confined in a peniten-
tiary, this evidence was sufficient to sustain a conviction for
false swearing. *Id.* 493

PERSONAL INJURIES—See Infants; Master and Servant; Rail-
roads

PERSONAL REPRESENTATIVES—See Executors and Admin-
istrators; Taxation.

PHYSICIANS AND SURGEONS—

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1. Injury from Want of Knowledge and Skill.—A physician or surgeon is answerable for an injury sustained by his patient resulting from want of the requisite knowledge and skill, or from his failure to use reasonable care and diligence in the treatment of the patient, including a diagnosis of the case so as to discover the patient's malady; and the standard of skill which the physician should possess and the care which he should exercise is that skill and care and diligence possessed and exercised by physicians in similar neighborhoods and similar surroundings and engaged in the same general line of practice. *Stevenson v. Yates*..... 196.
2. Injury from Want of Knowledge and Skill—Evidence.—A pregnant woman applied to defendant, a practicing physician, for treatment. Defendant diagnosed the case as kidney trouble and gave plaintiff some strong medicines that after taking produced pains and nausea and made plaintiff nervous. After four months plaintiff, who was forty-two years old and never been pregnant before, suggested the possibility of pregnancy and defendant said no, that the pain and enlargement were due to gas in plaintiff's stomach and gave her more strong medicine and advised her to continue her work, which she did, until she was stricken with labor pains after which she gave birth to a dead child. Held, that a peremptory instruction to find for defendant at close of plaintiff's testimony was improper. *Id.* 196

PLEADING—See Account, Action On; Adverse Possession; Appeal and Error; Contracts; Divorce, 6; Executors and Administrators; Frauds, Statute of; Insurance; Limitation of Actions; Master and Servant; Negligence; Taxation—

1. Amendments.—Where a defendant styled his pleading "amended petition" by which a new defendant was brought into the action by summons thereon, the responsive pleading of the latter styled "Answer, Counterclaim and Cross Petition," although as a cross petition directed against other defendants, will be treated as an adverse pleading to the claim to the land in dispute of the defendant, who styled his pleading an "amended petition." *Maynard v. Thompson* 140
2. Amendments.—The court having overruled the demurrer to plaintiff's petition, seeking damages for breach of contract, and upon final submission having set aside the order and sustained the demurrer an amendment tendered by the plaintiff on the day the judgment was rendered should have been filed. *F. T. Justice & Co. v. Rogers*..... 466
3. Amendments.—Under section 134 of the Civil Code the court may at any time, in furtherance of justice, permit pleadings to be filed for the purpose of correcting mistakes. *Id.*..... 466

PLEADING—Continued—

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4. Exhibits.—Where the allegations of a pleading are in conflict with an exhibit attached to it, and upon which the pleading is founded, the exhibit controls. *Hoffman v. Arnold* 486
5. Demurrer.—A petition which shows the plaintiff's right of recovery depends upon the non-performance or failure of a named contingency, must negative the contingency and show the absolute right of the plaintiff, else the pleading is demurrable. *Id.* 486
6. Estoppel—Reply—Sufficiency.—In an action on an account, the allegations of the reply held insufficient to constitute an estoppel against certain claims set up in the answer, counterclaim and set-off. *Wilson v. Carrollton Leaf Tobacco Warehouse Co.* 536
7. Action Upon Officer's Bond for Arrest—Sufficiency of Petition.—A petition which alleges that the person arrested was acting in a peaceable and quiet manner; that he had not committed a public offense, either in or out of the presence of the officer; that the officer had no warrant or other judicial authority for arresting the plaintiff, and that the officer did not have reasonable grounds for believing that the plaintiff had committed a felony, does not state a cause of action against the surety in the official bond, although it may state a cause of action against the police officer for the reason that the surety is only liable for the wrongful acts of the policeman done in the performance of a duty devolving upon the officer, and when a warrant is placed in his hands for execution, or a public offense is committed in his presence, and not when the officer acts willfully and maliciously without authority of law in committing the trespass. *Taylor v. Shields, Shore and Chicago Bonding Co.* 669
8. Striking Out Pleading.—The court did not err in overruling the defendant's motion to strike from the petition, the allegations thereto not being objectionable. *L. & N. R. Co. v. Vaughan's Admr.* 829

POSSESSION—See Adverse Possession; Quieting Title.

PRACTICE—See Appeal and Error.

PREMIUMS—See Insurance.

PRESCRIPTION—See Easements.

PRESUMPTIONS—See Appeal and Error; Deeds.

POLICEMEN—See Municipal Corporations.

PRINCIPAL AND AGENT—See Evidence—

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Powers of Agent—Scope of General Authority.--Linemen in the employ of an electric power company, having general powers to repair the line and protect wire entrusted to their care, have no authority to attach bundles of wire to a charged wire in such a way as to make a death trap for those who may attempt to steal the wire or take it away. *William Craig's Admx. v. Ky. Utilities Co.*; *George Craig v. Ky. Utilities Co.* 274

PRISONER—See Arrest; Contracts.

PRIVILEGED COMMUNICATIONS—See Witnesses.

PROCESS—See Corporations.

PROFITS—See Damages.

PROMISE—See Frauds, Statute of.

PROPERTY—See Taxation.

PUBLIC POLICY—See Contracts.

PUBLIC USE—See Eminent Domain.

PUBLIC LANDS—

1. Patents—Title—Evidence.—But where the validity of plaintiff's title depends upon whether or not a previous survey, the basis of defendant's patent, is an exclusion by the terms of plaintiff's patent or invalidates it pro tanto under section 4704 of the Statutes, it becomes necessary in order to determine the validity of plaintiff's patent to ascertain whether or not defendant's prior survey is valid, since only legal subsisting prior surveys are excluded from or invalidate a subsequent survey or patent. *Bryant v. Meadors*..... 651
2. Entry, Survey and Patent.—Land warrants issued by the Whitley County Court under the acts of the Legislature of 1835 and 1837, in consideration of bonds rather than cash, and entries and surveys made thereon, are legal only if actually paid for in money or labor and filed together with any plat or certificate of survey made thereon, with register of the land office on or before March 1, 1852, as required by the acts of 1850 and 1851, and the defendant's survey and the land warrant under which it was made, not having been thus legalized, was not a legal subsisting previous survey; and was not an exclusion from nor did it invalidate plaintiff's subsequent entry, survey or patent. *Id.* 651
3. Validity of Patent.—While a patent valid on its face can not ordinarily be attacked collaterally, upon such an attack the

PUBLIC LANDS—Continued—

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- warrant, certificate of survey and other papers required to be filed in the land office and referred to in the patent as authority for its issuance, may be read with the patent to show its invalidity. *Id.* 651
4. Patents.—Parties can not acquire under an invalid survey or patent such vested interests as alone will defeat a valid patent. *Id.* 651
5. Survey—Title.—The fact that in an old suit to which plaintiff was neither a party nor a privy, an attack failed upon defendant's survey does not estop her from asserting her title, although she or her agents were living in the vicinity of the land at the time. *Id.* 651
6. Boundaries—Surveys.—A patent excluding all lands within the boundary theretofore surveyed has application only to valid, subsisting legal entries and surveys, and does not include surveys never perfected as required by law. *Bryant v. Hamblin; Sutton v. Bryant and Hamblin*..... 716
7. Failure to Register Survey.—One entering under a county court land warrant, executing a bond, for cited consideration, not paying for the land and failing to register his survey in the land office within the time specified by statute, legalizing the proceedings, forfeits all rights under the warrant or survey. *Id.* 716

QUESTION OF LAW—See Appeal and Error.

QUESTIONS FOR JURY—See Adverse Possession.

QUIETING TITLE—See Injunction—

Actual Possession.—An action to quiet title does not lie against a defendant who is in the actual possession of the land. *Taylor v. Wilson* 695

RAILROADS—See Appeal and Error; Carriers; Eminent Domain—

1. Injuries to Persons on Track—Lookout—Instructions.—Where the public with the knowledge and acquiescence of the railroad company have continuously used its track for a long period of time, in populous and thickly settled communities, the presence of persons on the track where it is so used must be anticipated by the company in running its trains, and it owes to such persons the duty of keeping a lookout and giving warning the same as is required at public crossings, and if a person is injured at such point by a failure to give warning or keep a lookout, a recovery may be had unless the contributory negligence of the person injured is such as to defeat it, and this question should be

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- submitted to the jury on proper instructions. *Louisville & Interurban Railroad Co. v. Clore* 261
2. Crossings—Lookout.—A railroad company is not exempt from liability for damages inflicted at a private crossing where the crossing is in a town and at a place where the presence of persons on the track is to be anticipated and which crossing is used daily by a great number of people, since at such places the company is required to keep a lookout and to give reasonable warning of the approach of the train to the crossing. *Id.* 261
3. Injuries to Trespasser on Train—Suit for Wrongful Death—Appointment of Administrator to Sue.—The court of the county wherein a trespasser on a train is injured by the negligence of a railroad company may appoint an administrator to sue the company, though the deceased was a non-resident and died in another state, and left no property nor indebtedness due him in this state other than his right of action. *Chesapeake & Ohio Railway Co. v. Ryan's Admr.* 428
4. Death of Person On or Near Track—Negligence—Evidence—Sufficiency.—In an action against a railroad company for death, of a pedestrian on a public street, evidence held insufficient to warrant a finding of negligence. *Louisville & Nashville Railroad Co. v. Cook* 773
5. Injuries to Persons on Tracks—Trespassers or Licensees.—Whether a person injured while on a railroad track is a trespasser or licensee must depend, not on the fact that the accident happened in a city, incorporated town, or at a public crossing, but upon the number of persons using the track at said point. *L. & N. R. R. Co. v. Vaughan's Admr.* 829
6. Trespassers or Licensees.—Whether decedent was a licensee or trespasser held under the evidence a question for the jury. *Id.* 829
7. Warnings—Lookout.—The duty of a railroad company to give the necessary warnings, keep a lookout and have its trains under reasonable control applies in the yards of the company, if the same are used by the public to such an extent as to constitute the person injured a licensee. *Id.* 829
8. Employees—Care Toward General Public.—The care devolving upon railroad employees toward the general public is to be determined by principles of law and not by the rules of the company for the guidance of its employees. *Id.* 829
9. Signboards or Warnings—Pedestrians.—The existence of signboards or warnings is not conclusive that a pedestrian is not licensed to use the way. A license to use the tracks may be acquired by use on the part of the public regardless of such signboards. *Id.* 829

RAW MATERIAL—See Manufacture; Taxation.

REAL ACTIONS—See *Infants*.

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REPRESENTATIONS—See *Corporations*; *Estoppel*.

RES GESTAE—See *Homicide*.

RES IPSA LOQUITUR—See *Master and Servant*.

RESTORATION—See *Divorce*.

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SELF-DEFENSE—See *Assault and Battery*; *Homicide*.

SERVICES—See *Attorney and Client*; *Guardian and Ward*.

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SIGNATURE—See *Frauds*, *Statute of*.

SIMPLE TOOL RULE—See *Master and Servant*.

SLAVE MARRIAGES—See *Marriage*.

SPECIFIC PERFORMANCE—

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1. When Will Not Be Decreed.—Where the performance of a contract is in fact impossible and its decree of specific performance cannot be enforced the court will deny the remedy. In this case grantor had only a defeasible fee and the specific performance of a contract to convey a fee simple title cannot be decreed. *Jenkins v. Dawes* 25
2. Nature and Grounds of Remedy in General.—The remedy of specific performance is not one which will be granted as a matter of right, but will be granted or withheld by the court in the exercise of a sound judicial discretion, which, however, is not an arbitrary or capricious one, but is one to be exercised according to the principles of equity, and when to enforce it would operate harshly and oppressively upon the defendant and in a way not reasonably contemplated when the contract was entered into, the relief will be withheld and the complaining party relegated to his remedy at law. *Lexington & Eastern Railway Co. v. Williams and Wife* 343
3. When Will be Denied.—Although such harsh, oppressive and unconscious results would follow a specific execution but not to the extent to authorize its denial under above rule if the contract, strictly construed, does not include or provide for the specific relief sought, it will be denied. *Id.* 343
4. When Will be Denied.—A contract provided for the sale of a right of way through vendee's farm, through which ran a natural stream, and in which running longitudinally, the railroad company selected its right of way. The contract provided for a price for "hill" land and another for "bottom" land. Held, that neither descriptive term applied to the bed of the stream, and the specific performance sought to compel the execution of a deed to that portion of the vendee's farm in the bed of the stream will be denied. *Id.* 343

STATUTE OF FRAUDS—See Frauds, Statute of.

STATUTES—

1. Construction—Intent.—In the construction of statutes the intention of the legislature in enacting them must prevail, and such intention is to be gathered from the words which the legislature employed. If those words are distinct, plain and unambiguous they must be given effect, although such construction might curtail the application of the statute so as to partially defeat the general purpose which the legislature had in view, since it is the duty of courts to construe that which is written and not to amend, change or alter a plainly written statute so as to make it accomplish some supposed purpose of the legislature in enacting it. *Western & Southern Life Insurance Company v. Weber* 32
2. Municipal Corporations—Classification—The act here in ques-

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tion (Acts 1916, page 619) is entitled "An act to amend section 2740 and section 2741 of article 1, chapter 89, Ky. Statutes, Carroll's revised edition, 1915, relating to the classification of cities and towns," and makes in the act it is intended to amend two obvious changes, viz.: (1) it takes the city of Ashland from the fourth class and puts it to the third class; (2) it omits from the fourth class, where it had theretofore been placed, the town of London, which omission by virtue of the provisions of section 2741 of the act put it in the sixth class with all other towns not specifically named in any of the previous classifications. Section 2740, Ky. Statutes, as amended by the act of 1916, being repugnant to its former provisions, by implication repeals such of the former provisions as conflict with those of the act in its amended form. Town of London v. Brown 63

3. Municipal Corporations—Classification.—The act of 1916 is in no sense violative of section 51, Constitution. The subject expressed in the title has relation to but one thing or matter, viz.: the classification of cities and towns; and as all of its provisions relating to this one subject expressed in the title are germane to and naturally connected therewith, it meets every requirement of section 51, Constitution. Id. 63

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Negligence; Trial.****SUBSCRIPTIONS—See Bankruptcy; Corporations.****SUPERSEDEAS—See Appeal and Error.****SURETIES—See Bills and Notes.****SURETYSHIP—See Husband and Wife.****SURFACE WATERS—See Waters and Water Courses.****SURPRISE—See New Trial.****SURVEYS—See Boundaries; Public Lands.****TAXATION—See Abatement and Revival; Municipal Corpora-
tion—**

1. Inheritance Tax—Persons Liable.—An administrator is not liable for inheritance taxes unless the property came into its hands or it was entitled to administer thereon. *Commonwealth v. Lee's Trustee*.....
2. Inheritance Tax—Persons Liable.—Where a non-resident woman, by written agreement, delivered property to a trust company to hold and manage for her benefit, with a provision, that if the agreement was not terminated, or if she did not dispose of the property by will, it was to pass absolutely to those persons who, under the present statutes of descent in Kentucky, would be her heirs at law, a trust was created in

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- favor of her heirs which the trustee had the right to discharge by direct payment to them, and in the absence of a showing that the general estate of the decedent, which came into the hands of the decedent's administrator in this state, was insufficient to pay the debts of the decedent due to citizens of this Commonwealth, the resident administrator had no right to administer on the trust property, and was not liable for the inheritance taxes. *Id.* 6
3. Inheritance Tax—When Payable—When Collectible by Coercive Process.—Though an inheritance tax may be paid at any time after the death of the decedent, yet subject to the exception that the executor, administrator, or trustee must pay the tax within thirty days after its retention or receipt by him, the tax cannot be collected by coercive process until after the expiration of eighteen months from the death of the decedent, and even this time may be extended, if by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of the decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent. *Id.* 6
4. Discrimination Between Non-Resident and Resident Owners Not Allowable.—The legislature has no power to subject to taxation the property of non-residents in this state if like property owned by residents is exempt from taxation. *Raydure v. Board of Supervisors, Estill County* 84
5. Of Mineral Rights and Leases of Non-Residents.—The fact that the legislature provides a different method of ascertaining the value and character of property owned by non-residents in this state in order that it may be assessed, from that provided for the assessment of like property of residents is not discrimination. *Id.* 84
6. Schedule of Property Subject to Assessment—Assessment of Property Not Mentioned in.—Although assessable property of a particular description may not be mentioned in the tax schedule it is subject to assessment and taxation under section 4020 of Kentucky Statutes and the item in the schedule providing for the assessment of the value of "property not mentioned in the schedule." *Id.* 84
7. Oil Leases.—Oil leases giving the lessee the exclusive privilege for a specified time of exploring for and producing oil on the leased premises is property that may be assessed for taxation. *Id.* 84
8. Definition of Word "Property."—In its broad sense the word "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises and hereditaments that a person owns. *Id.* 84
9. Definition of Property That Has Assessable Value and May

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- Be Taxed.—Under our Constitution all property that has a cash value in any amount and that may be the subject of barter and sale is subject to assessment and taxation. The test is—Has it a cash value in some amount, and if offered for sale could any bidder be found that would pay a cash price for it in any sum? *Id.* 84
10. Ascertainment of Fact Whether Property is Subject to Assessment.—A dispute between the taxpayer and assessing authorities as to whether certain property has any assessable value is a question of fact that must be determined as are other disputed issues of fact. *Id.* 84
11. Oil Leases.—Oil leases if they have any cash value are subject to assessment although there may be producing wells on the territory covered by the leases on which a production tax on the oil produced is paid by the owner of the lease. *Id.* 84
12. Oil Production Tax.—The legislature may fix a production tax on the value of oil produced but it must not be an unreasonable or arbitrary tax. *Id.* 84
13. Oil Leases—Production Tax on Oil is a License Tax.—The act providing for an oil production tax is a license tax on the business of producing oil and is authorized by section 181 of the Constitution. *Id.* 84
14. License Tax—Property Tax.—In addition to the ad valorem property tax authorized by section 171 of the Constitution a license tax may be imposed on any trade, occupation or profession. *Id.* 84
15. License Tax—Character of Tax That May Be Levied.—A license tax may be regulated on an ad valorem basis on the volume of business done or it may be a fixed sum levied for carrying on the business. *Id.* 84
16. Property Tax Authorized by Section 171 of the Constitution Must be Uniform.—Section 171 of the Constitution as amended only provides for a property or ad valorem tax, and this tax must be uniform upon all the property subject to the tax. *Id.* 84
17. Classification of Property—Uniform Property Tax.—If property is classified under section 171 of the Constitution only a uniform tax can be levied on the property embraced in the class. *Id.* 84
18. License Tax Cannot Be Substituted for Property Tax.—A license tax for engaging in a business, trade or profession cannot be imposed in lieu of a property tax but it may be imposed in addition to the property tax. *Id.* 84
19. Oil Leases—Assessment of for Taxation.—Where the same person owns several oil leases each should be assessed for taxation separately from the others. *Id.* 84
20. Oil Leases.—Exemption of Producing Wells.—In ascertaining

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- the value of an oil lease for taxation the value of producing wells on the premises should be excluded. *Id.* 84
21. Assessment of Oil Leases—Exemption of Producing Wells.—Whether it is allowable in fixing the value of an oil lease to exempt in connection with the well five acres of land adjoining or any number of acres is a question not decided. *Id.* 84
22. How Value of Franchise Ascertained.—In a proceeding under section 4082, Kentucky Statutes, by a revenue agent, to recover taxes due upon a franchise owned and held by an individual and operated between two states, the proper method to ascertain the value of the franchise is to capitalize the net earnings of the business wherein the franchise is exercised, and from the sum thus ascertained deduct the assessed value of the tangible property, and if there be no net income after deducting the cost of the operation from the gross income, no franchise tax is recoverable. *Commonwealth v. Kottmyer* 163
23. Manufacture.—Under a statute exempting from local taxation "raw material actually on hand at their plant for the purpose of manufacture" raw or green tobacco on hand at a factory that is only given some preliminary treatment at the factory and then sent to other factories to be put in shape for sale on the market is not exempt from local taxation. *P. Lorillard Co. v. Ross, Sheriff*..... 217
24. When Raw Material Exempt From—Manufacture—What is.—The test of whether raw material is on hand at a factory for the purpose of being manufactured is this—is the raw material converted at that factory or plant into a finished product complete for the final use for which it was intended or so completed as that in the ordinary course of the business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it? *Id.* 217
25. Raw Material—When Exempt From—Manufacture—What is.—It is not essential before the exemption applies that raw material should be converted at the factory into a finished product fit for the final use for which it was intended. It will be sufficient if it is on hand for the purpose of being there converted into an article ready for sale on the open market although after the product has been so sold it may be put by other parties to the final use for which it was intended. *Id.* 217
26. Notice to Taxpayer of Raise of Assessment.—Under section 4122 of the Kentucky Statutes if the Board of Supervisors raises the list of the taxpayer he must have notice of the raise or else it will be void. *Id.* 217
27. Notice to Taxpayer of Raise of Assessment.—Where a taxpayer furnishes to the Tax Commissioner a list of property

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- that he claimed to be exempt from taxation and the Tax Commissioner accepted the list as exempt, and thereafter the Board of Supervisors, without notice to the taxpayer, placed the property in a list subject to taxation, this was in effect raising the assessment without notice and the action of the Board of Supervisors was void. *Id.* 217
28. Injunction.—Where a Board of Supervisors raises without notice the list of a taxpayer he may enjoin the collection of the taxes. *Id.* 217
29. Assessment of Franchise—Injunction—Pleading.—In an action to enjoin the Board of Valuation and Assessment from assessing the franchise of a corporation at a sum greater than that fixed in the petition, a general demurrer confessed the truth of the allegation, and there being no other plea to the petition seeking the relief, and it stating a cause of action, the demurrer was properly overruled and the relief prayed for properly granted. *Bosworth, Auditor v. Kentucky Highlands R. Co.* 749

TENANCY—See Landlord and Tenant.**TELEGRAPHS AND TELEPHONES—**

Negligence—Limiting Liability by Contract.—Since the passage of the Act of Congress of June 18, 1910 (36 St. Lar. 544) a telegraph company may by contract limit its liability for negligence in failing to deliver an unrepeatd interstate message, and this right is unaffected by the acts of Congress approved March 4, 1915, and August 9, 1916, known as the first and second Cummins Acts. *Merriweather v. W. U. Tel. Co.*..... 710

TELEPHONES—See Telegraphs and Telephones.**TENDER—See Deeds, 3.****TIMBER—See Logs and Logging.****TITLE—See Deeds; Execution; Public Lands; Trespass.****TOLLS—See Counties.****TORTS—See Master and Servant—**

1. Joint Tort Feasors—How Sued.—It is a well known rule of the common law that joint tort feasors may be sued jointly or severally at the election of the plaintiff; and if jointly sued a trial shall be had as to all the defendants at one and the same time. The Kentucky Civil Code makes no material change in this rule. So where, as in this case, the injury to the person of the plaintiff complained of results from the con-

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- curring negligence of the two defendants jointly sued, neither of them is, as a matter of right, entitled to a separate trial; nor does the fact that they severally answer, make any difference. *Hutchison v. Ohio Valley Electric Ry. Co.*..... 396
2. Joint Tort Feasors—Separate Trials.—It would be unwise to hold that in no state of case should one or each of several defendants jointly sued for a tort, be allowed a separate trial or trials, but safe to declare that to authorize the severance, the trial court should be convinced that it would be essential to the ends of justice, and that the facts or circumstances are of such exceptional character as to imperatively require it. But in no case will the Court of Appeals approve the action of the trial court in permitting the severance, unless it is affirmatively made to appear of record that it was properly allowed. *Id.* 396

TRANSCRIPTS—See Appeal and Error.

TRANSFER OF CAUSES—See Equity; Trial.

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TRESPASS—See Appeal and Error; Forcible Entry and Detainer; Railroads—

1. Action for Upon Land—Evidence.—A party, who sues for trespasses upon his land, and his ownership is denied, must show, that he is the owner of the land, by some one of the ways, provided by law, for acquiring ownership of lands, before he can recover. *Bordes v. Leece*..... 146
2. Liability for Injury from Invasion of Property.—A vendee or lessee of real estate is not exempt from liability for an injury that results from an invasion of another's property, where his possession is based upon no other title than a tortious entry by his vendor; as in such case the act of the vendor in appropriating the property being wrongful, that of the vendee in retaining possession of the property is equally so. *Hazard Dean Coal Co. v. McIntosh* 316
3. Wrongful Transfer of Property—Compensation.—The party originally wrongfully taking or occupying the property, can not transfer to another by lease or otherwise any right in the property, except subject to the duty to make compensation therefor. *Id.* 316
4. Measure of Damages—Instructions.—Where there is a wrongful taking of land constituting a trespass, the wrongful taker thereof cannot complain that the trial court in instructing the jury as to the measure of damages, did not give the measure applicable to the taking of the land by condemnation proceedings; nor in such case was there any error in in-

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- structing the jury that the measure of damages was the same as applicable in a case of trespass to realty. *Id.*..... 316
5. Title—Evidence.—In an action to enjoin trespass where only the title of plaintiff is put in issue, his success depends upon the strength of his own title and not upon any weakness in that of the defendant. *Bryant v. Meadors*..... 651

TRESPASSERS—See Railroads.

TRIAL—See New Trial—

1. Instructions—Requests—Necessity.—Where in an action for assault and battery the instruction on self-defense is correct as far as it goes plaintiff cannot complain of the court's refusal to give an instruction qualifying the right of self-defense if the defendant brought on the difficulty by first striking the plaintiff in the absence of a request therefor. *Schroeder v. Coppin* 61
2. Submission to Court.—Where the facts of the case are undisputed and but one legitimate inference can be drawn therefrom from the court and not the jury should determine their effect. *John Druzille, Wood-Heck v. Roll*..... 128
3. Evidence—Verdict.—Where the evidence is conflicting, it is the duty of the jury to reconcile it and find the fact, and it is improper in such cases for the court to determine the fact by directing the jury to return a particular verdict. *Louisville & Interurban Railway Co. v. Clore*..... 261
4. Action for Wrongful Death—Negligence—Evidence—Sufficiency.—In an action against a railroad company and its brakeman to recover damages for the death of a trespasser on a train, evidence examined and the question whether the deceased was forced off the train held for the jury. *C. & O. R. Co. v. Ryan's Admr.* 428
5. Action for Wrongful Death—Instructions.—In an action against a railroad company and its brakeman for the death of a trespasser alleged to have been forced off the train while it was going at an excessive rate of speed, an instruction submitting this issue was not erroneous because it failed to tell the jury that the deceased was a trespasser, or that the defendants had a right to eject him if they used proper care in doing so, since even though the deceased was a trespasser, the company had no right to force him off the train while it was going at a dangerous rate of speed. *Id.* 428
6. Action for Wrongful Death—Instructions.—In an action against a railroad company and its brakeman for the death of a trespasser alleged to have put off the train while going at an excessive rate of speed, an instruction telling the jury that if they believed from the evidence that deceased voluntarily

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- attempted to get off or alight, "without being forced to do so," and sustained the injuries complained of, they should find for the defendants, was not erroneous because of the use of the words, "without being forced to do so," since these words were necessary in order to give proper effect to the word "voluntarily." *Id.* 428
7. Action for Wrongful Death—Instructions—Evidence—Error.—In an action against a railroad company and its brakeman to recover for the death of a trespasser, the refusal of the trial court to instruct the jury that the life tables introduced in evidence did not show the expectation of persons engaged in hazardous employments like coal mining, but only the expectation of persons accepted as approved risks by standard life insurance companies, and the admission of testimony that the deceased contributed to the support of his mother and was a good, moral boy, were not prejudicial error. In view of the fact that they could have affected only the amount of the verdict, and the jury's finding was only \$3,000.00. *Id.*..... 428
8. Instructions.—Where the only issue in the case was fully covered by the given instruction, it was not error to refuse an offered instruction which submitted the same issue in a more confusing form. *Id.* 428
9. Transfer of causes.—Where plaintiff sues on a long and complicated account growing out of a contract, the defendant is entitled to a transfer of the cause to the common law docket, where the account is admitted by a failure to deny, and the answer, set-off and counterclaim present three distinctly legal issues triable by a jury. *Wilson v. Carrollton Leaf Tobacco Warehouse Co.* 536
10. Transfer of Causes—Motion for Transfer—When Seasonably Made.—A motion for transfer of a cause to the common law docket for trial of legal issues is seasonable, when made within a reasonable time after the filing of the pleading tendering the issues. *Id.* 536
11. Instructions.—An offered instruction is properly refused where there is no evidence to support it. *L. & N. R. R. Co. v. Edward's Admx.* 555
12. Peremptory Instruction.—A peremptory instruction is proper only after admitting every fact shown by the plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, plaintiff fails to establish his case. *L. & N. R. R. Co. v. Baker's Admr.* 795
13. Argument of Counsel.—Argument of counsel should be limited to matters within the record or to fair and reasonable deductions arising therefrom. *Id.* 795
14. Argument of Counsel.—Reasonable latitude should be accorded counsel in the closing argument to the jury, provided the argument be confined to facts shown by the evidence and

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reasonable deductions therefrom. Argument not supported by the record is improper. *L. & N. R. R. Co. v. Vaughan's Admr.* 829

TRUSTEES—See Trusts.

TRUSTS—

1. Removal of Trustee.—If anything interferes to prevent a just and proper discharge of the trust and fiducial duties of the trustee or the trust is not being properly conducted, or by reason of hostility between the trustor and the trustee the court should be convinced that a change in trustees would be advisable, the trustee can be removed. *Smallwood v. Lawson* 189
2. Compensation of Trustee.—A trustee, even though interested in the trust property, is entitled to compensation for his services, unless estopped by express or implied contract. *Schrivver v. Frommel* 597
3. Compensation of Trustee.—Where the will of the father of the parties, fixing the compensation of his executors and trustees at \$1,500.00, was probated and at the same time a trust deed was executed to one of the parties requiring of him the same duties as the executors and trustees under the will would have had to perform and without changing the provisions of the will as to compensation, held that the trustee is entitled to an allowance in that amount, which is very moderate compensation for the services performed. *Id.* 597
4. Trustees Ex Maleficio—Equitable Liens.—Where vendors not only conveyed land by deed containing a covenant of general warranty, and purporting to convey the entire title, but also fraudulently represented that they were the owners of the entire title, and it subsequently developed that they were the owners of only a life estate in the property they became trustees for the purchaser of that portion of the purchase money for which there was no consideration, and the trust attached to land bought with such purchase money, and entitled the purchaser to an equitable lien thereon. *Scott v. Scott*..... 604
5. Parol Testimony.—The objects and purposes of a latent trust, or an express parol trust can be given or shown by parol testimony. *Best, Rec. v. Melcon*..... 785

UNDUE INFLUENCE—See Deeds; Wills.

VENDOR AND PURCHASER—See Estoppel—

1. Breach of Warranty—Vendor's Liability for Counsel Fees and Cost.—In an action by remaindermen to correct the record of a deed, and to quiet their title to the remainder interest in the land against a purchaser from the life tenant, by deed containing a covenant of general warranty, and purporting to con-

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- vey the entire title, the defendant was entitled to recover on the warranty the full amount of the cost and attorneys' fees incurred in defense of his title, where the correction of the record was a necessary step in order that plaintiffs' title to the remainder interest in the land might be quieted. *Scott v. Scott* 604
2. Sale of Mine—Outstanding Lease—Cancellation.—Where a coal mining lease was cancelled for the sole purpose of carrying out a sale of the property covered by the lease, and the sale was abandoned, the cancellation never became effective, and a suit to recover on the lease against subsequent purchasers of the property who did not know of, or rely upon, the cancellation of the lease. It was not error to hold that the lease had not been cancelled. *Empire Coal Mining Company v. Empire Coal Co.* 699

VERDICT—See Appeal and Error; Damages; Trial.

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Action by Remaindermen Against Purchaser From Life Tenant—Evidence—Sufficiency.—In an action by remaindermen against a purchaser from the life tenant to recover for timber cut and removed, a judgment for \$200.00 held erroneous, since the evidence authorized a finding of only \$137.13. *Scott v. Scott* 604

WATERS AND WATER COURSES—

1. Easements.—An upper proprietor has an easement in the land of his adjoining neighbor below for the natural flow of surface water and that in natural streams, and the lower proprietor may not interfere with either by the construction of dams or otherwise impeding the flow. *Franz v. Jacobs*..... 647
2. Surface Water.—The owner of the upper estate may not collect or concentrate on his land surface water and then empty it in volume upon his adjoining neighbor below, nor can he by artificial means cause increased amounts of water to flow into natural streams so as to damage the lower proprietor. *Id.* 647
3. Damages.—To enable the lower proprietor to maintain a suit for a violation of his rights by the upper proprietor he must show that the damage and injury of which he complains is the proximate result of the alleged wrongful act. *Id.*..... 647

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1. Lapsed Legacies.—Under section 4843 of the Kentucky Statutes providing that where a devise of property has failed or is otherwise incapable of taking effect it shall not be included in the residuary devise but shall pass as in case of intestacy, where a devisee who has been given the fee, dies before the testator, the property devised passes under the statute as if the testator had died intestate as to it. *Commonwealth v. Manuel, Executor* 48
2. Construction of—Intention.—The most prominent and controlling rule in the construction of wills is that the intention of the testator as it may be gathered from what is written in the whole will is absolutely controlling where the intention so gathered does not conflict with some rule of law. *Id.*..... 48
3. Construction of—Must be Read as a Whole.—The will must be read as a whole and particular clauses, if in conflict with the intention of the whole instrument, must give way to this intention and be construed if possible in harmony with it. *Id.*... 48
4. Construction of—Extrinsic Evidence—When Admissible.—Extrinsic parol or written evidence is not admissible for the purpose of ascertaining what the testator intended to but did not say, or for the purpose of altering or contradicting the terms of the will or adding to or subtracting anything from it. *Id.* 48
5. Construction of—Extrinsic Evidence—When Admissible.—But extrinsic evidence is competent for the purpose of showing the circumstances and conditions surrounding the testator at the time the will was executed and his relations to the devisees and those excluded when the circumstances and conditions and such relations throw pertinent light on what the testator intended by what he did say in his will. *Id.* 48
6. Construction of—Extrinsic Evidence—Admissibility of.—Extrinsic evidence is admissible not only to explain latent ambiguities in the instrument but to aid the court in arriving at the intention of the testator when upon a reading of the whole will the mind is left in doubt as to what the testator meant to say by what he did say, no matter what the nature or character of the defect or ambiguity in the arrangement, construction or phraseology of the will this doubt may arise from. *Id.* 48
7. Construction of—Extrinsic Evidence—When Admissible.—Where the meaning of the will is so plain and the intention so clear as not to leave room for two opinions as to either, extrinsic evidence is neither needed nor admissible. *Id.* 48
8. Construction of—Where testator in one clause gave to his wife the "entire remainder of my estate, including all bonds, notes, accounts, mortgages, choses in action and other personal effects of whatever kind or character I may be seized, possessed or entitled to," this clause standing alone, would give

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- the wife a fee, and upon her death before the testator it would pass under section 4843 of the statutes as undevise estate; but when read in connection with clause 7 of his will in which he provided that "should there be any of my estate remaining after the foregoing provisions shall have been carried into effect," the wife took only a life estate under clause 4, and at the death of the testator it passed to the residuary devisees, according to the intention of the testator as expressed in the whole will. *Id.* 48
9. Construction of—Life Estate With Power to Use More Than Principal.—The wife was given in clause 4 more than an ordinary life estate but less than a fee. She had the right to use not only the income but so much of the principal as might be needed and what was left passed to the residuary devisees. *Id.* 48
10. Inequality of Disposition of Estate.—Proof of inequality of disposition among the objects of a testator's bounty, does not invalidate a will, unless fortified by evidence, proving incompetency of the testator, or the existence of undue influence exerted upon him. *Gay v. Gay* 238
11. Distribution of Estate.—A testator, who is mentally competent, and not controlled by undue influence of another, may dispose of his property, as he chooses, and may select between the natural objects of his bounty, or he may discard them, and dispose of his estate to other objects. *Id.* 238
12. Dreams—Influence of.—Proof, that a testator has, in previous years, had dreams, the interpretations of which, by himself, he obeyed, will not invalidate a will made by the testator, unless it appears, that he was acting under the influence of a dream, in the testamentary act. *Id.* 238
13. Undue Influence—Burden of Proof.—The burden of proof is upon one, who charges, that a will was the product of undue influence, and while like fraud, the one exerting it, usually does so, secretly and surreptitiously, there must still be some evidence of it, and if there is none, the charge fails. *Id.* 238
14. Construction.—A will which bequeaths the whole of the estate, not otherwise disposed of, to C, in case the mother of a named child will not surrender the child into the custody of another person, disposes of the whole estate of the testator, and a house and lot owned by him passes under the will, and is not undevise. *Hoffman v. Arnold* 486
15. Allowance to Contestants.—Contestants of a will are not entitled to an allowance out of the income of the estate, to enable them to prepare their contest, even though under the will they are entitled to support out of the income, and would be entitled to whole estate if the will is rejected. *Cecil's Exor's v. Embry.* 739

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2. Attorney and Client—Privileged Communications.—In an action against an insurance company for the loss of her property by fire, the defense being the appellee procured the house and contents to be burned for the fraudulent purpose of collecting the insurance, it was permissible to prove a communication made by her in reference to her connection with the burning of the house by the attorney to whom the communications were made, such communications not having been made to the attorney in his professional capacity, and therefore not privileged. *Id.* 679

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